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# Report of Working Group III (Transport Law) on the work of its seventeenth session (New York, 3-13 April 2006)

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## Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[1] The Working Group commenced its deliberations on a draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.60.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its seventeenth session in New York from 3 to 13 April 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Benin, Brazil, Canada, Chile, China, Colombia, Czech Republic, Fiji, France, Gabon, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Jordan, Kenya, Madagascar, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

3. The session was also attended by observers from the following States: Bulgaria, Cyprus, Democratic Republic of Congo, Denmark, El Salvador, Finland, Holy See, Kuwait, the Netherlands, New Zealand, Norway, Philippines, Senegal and Ukraine.

4. The session was also attended by observers from the following international organizations:

(a) **Intergovernmental organizations invited by the Commission**: Asian-African Legal Consultative Organization, European Community (EC);

(b) **International non-governmental organizations invited by the Commission**: Association of American Railroads (AAR), BIMCO, Comité Maritime International (CMI), European Shippers' Council (ESC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), and the International Union of Marine Insurance (IUMI).

5. The Working Group elected the following officers:

*Chairman*: Mr. Rafael Illescas (Spain)

*Rapporteur*: Mr. Walter de Sá Leitão (Brazil)

6. The Working Group had before it the following documents:

(a) Annotated provisional agenda and corrigendum (A/CN.9/WG.III/WP.60 and A/CN.9/WG.III/WP.60/Corr.1);

(b) A document on right of control orally presented for the information of the Working Group at its fifteenth session and published for its sixteenth session from the delegation of Norway (A/CN.9/WG.III/WP.50/Rev.1);

(c) A document on transfer of rights orally presented for the information of the Working Group at its fifteenth session and published for its sixteenth session from the delegation of Switzerland (A/CN.9/WG.III/WP.52);

(d) A document on delivery published for its sixteenth session, but consideration of which was not completed at that session, from the delegation of the Netherlands (A/CN.9/WG.III/WP.57);

(e) A proposal by Finland on scope of application, freedom of contract and related provisions (A/CN.9/WG.III/WP.61);

(f) A document on transport documents and electronic transport records presented for information by the delegation of the United States of America (A/CN.9/WG.III/WP.62);

(g) A proposal by the delegation of Switzerland on the delivery to the consignee and the carrier's right of retention of the goods (A/CN.9/WG.III/WP.63);

(h) Comments of the European Shippers' Council on the draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.64);

(i) A proposal by Japan on scope of application (A/CN.9/WG.III/WP.65);

(j) A document on volume contracts presented for the information of the Working Group by the Comité Maritime International (A/CN.9/WG.III/WP.66);

(k) A drafting proposal by the Swedish delegation on shipper's obligations (A/CN.9/WG.III/WP.67);

(l) A proposal by the Netherlands on bills of lading consigned to a named person (A/CN.9/WG.III/WP.68);

(m) A proposal by the United States of America on shipper's obligations (A/CN.9/WG.III/WP.69); and

(n) Proposals by the Italian delegation regarding transport documents and electronic transport records and scope of application, freedom of contract and related provisions (A/CN.9/WG.III/WP.70).

7. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea].
4. Other business.
5. Adoption of the report.

# I. Deliberations and decisions

8. The Working Group continued its review of the draft convention on the carriage of goods [wholly or partly] [by sea] ("the draft convention") on the basis of the text contained in the annexes to a note by the Secretariat (A/CN.9/WG.III/WP.56), and discussed various proposals, including the proposal by Finland on scope of application, freedom of contract and related provisions (A/CN.9/WG.III/WP.61); the proposal by Switzerland on the carrier's right of retention of the goods (A/CN.9/WG.III/WP.63); the proposal by Japan on scope of application (A/CN.9/WG.III/WP.65); the drafting proposal by Sweden on shipper's obligations (A/CN.9/WG.III/WP.67); the proposal by the Netherlands on bills of lading consigned to a named person (A/CN.9/WG.III/WP.68); the proposal by the United States of America on shipper's obligations (A/CN.9/WG.III/WP.69); and the proposals by Italy regarding transport documents and electronic transport records and scope of application, freedom of contract and related provisions (A/CN.9/WG.III/WP.70). The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

# II. Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]

## Right of control—Chapter 11

9. The Working Group was reminded that it had most recently considered the topic of right of control at its eleventh session (see A/CN.9/526, paras. 100-126). It was also reminded that a document containing information relating to right of control had been presented by Norway at the Working Group's sixteenth session (A/CN.9/WG.III/WP.50/Rev.1; see A/CN.9/576, para. 211). The consideration by the Working Group of the provisions of chapter 11 was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56, and on the proposed text as suggested in A/CN.9/WG.III/WP.50/Rev.1.

### Draft article 54. Definition of right of control

*Draft article 54. General comments*

10. The Working Group considered the text of draft article 54 as contained in A/CN.9/WG.III/WP.50/Rev.1, paragraph 7, and in A/CN.9/WG.III/WP.56. It was indicated that draft article 54 of A/CN.9/WG.III/WP.56 did not clearly distinguish between the right of the controlling party to give unilateral instructions, on the one hand, and the right of the controlling party to agree with the carrier on a variation of the contract of carriage, on the other hand. The Working Group was also reminded that draft paragraph 54 (b), providing that the controlling party could demand delivery of the goods before their arrival at the place of destination, had been the object of discussion in the past. In particular, it was indicated that according to some, such a demand would always amount to a variation of the contract of carriage and would therefore require the parties' agreement. Others, however, held the view that such a right was unilateral in nature and should be retained as essential, for

instance, in cases when no negotiable transport record was issued and the seller or credit institutions must enforce a pledge on the goods.

11. General support was expressed for the approach adopted in A/CN.9/WG.III/WP.56, in which provisions of right of control which may be exercised unilaterally by the controlling party were dealt with in draft article 54, while provisions requiring a variation to the contract of carriage and therefore the agreement of the carrier were dealt with separately in draft article 55.

12. Support was expressed to retain the bracketed word "means" and to delete the bracketed word "is" in the chapeau of draft article 54.

*Controlling party as the exclusive person that may exercise the right of control*

13. It was observed that the opening phrase of draft article 55, "the controlling party is the exclusive person that may exercise the right of control" was a general proposition regarding the right of control that should apply equally to draft article 54. The view was expressed that this phrase should be moved from draft article 55 to the chapeau of draft article 54, but other views were expressed that care should be taken in drafting to ensure that the statement of the general rule also applied to draft article 55 variations to the contract of carriage. There was general agreement that adjustments should be made to draft articles 54 and 55 to ensure the general application of the rule that the controlling party was the exclusive person that could exercise the right of control. In addition, it was suggested that a separate provision applying to both draft articles 54 and 55 could be considered.

*Draft paragraph 54 (b). Delivery at intermediate port or place en route*

14. The view was expressed that the request for delivery of goods at an intermediate port or place en route would always amount to a variation of the original terms of the contract of carriage and would entail a significant burden for the carrier as it would almost always interfere with the normal operations of the carrier and the right as such would conflict with the safeguards provided for in draft article 57. It was, therefore, suggested that draft paragraph 54 (b) should be deleted. However, the prevailing view in the Working Group was in favour of retaining the principle expressed in draft paragraph 54 (b), since it was deemed important to provide the controlling party with an effective manner to exercise the right of control, particularly in the face of a potentially insolvent buyer.

15. Support was expressed for retaining the second set of bracketed text in draft paragraph 54 (b) and for deleting the first set of bracketed text. It was stated that the controlling party should only have the right to request the carrier to deliver goods at intermediate ports or places en route. It was suggested that allowing the controlling party to request delivery at different ports or places would impose an unreasonable burden of deviation on the carrier with potentially serious economic consequences. In that connection, it was suggested that the reference to "an intermediate port or place en route" was not sufficient to protect the carrier against possible deviations arising from requests of the controlling party and that the draft provision should be further refined to clarify that the controlling party could request early delivery only at a scheduled port of call on that voyage. Further concerns were expressed regarding the possibility that the controlling party's request for delivery at a port or place other than originally foreseen would entail additional charges for the carrier

such as, for example, those relating to discharging a container stowed at the bottom of the vessel, and that in any case, the carrier should be reimbursed for any additional cost arising from such early delivery. However, it was also indicated that those concerns could be addressed by draft article 57, and, in particular, those provisions relating to non-interference with normal operations of the carrier, and with reimbursement of additional costs.

*Conclusions reached by the Working Group regarding draft article 54:*

16. After discussion, the Working Group decided that:

- The text of draft article 54 contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group's future deliberations;
- The brackets around the word "means" and the bracketed word "is" should be deleted in the chapeau of draft article 54;
- The principle according to which the controlling party was the exclusive person that may exercise the right of control should be inserted in the chapeau of draft article 54;
- The brackets around the second set of bracketed text and the first set of bracketed text should be deleted in draft article 54 (b);
- Words such as "at a scheduled port of call" should replace the words "at an intermediate port" in draft article 54 (b); and that
- The Secretariat should prepare a new version of draft article 54 taking into account the above deliberations.

**Draft article 55. Variations to the contract of carriage**

*Separate treatment in draft article 55 of variations to the contract of carriage*

17. As noted above in paragraph 11, there was general agreement in the Working Group for the structure of draft article 55 as it appeared in A/CN.9/WG.III/WP.56 in terms of it providing for separate treatment of the exercise of the right of control that resulted in a variation of the contract of carriage. Some concern was expressed that, while the creation of a separate provision concerning exercises of the right of control that resulted in variations to the contract of carriage was a positive step, paragraphs (b) and (c) of draft article 54 could also be considered variations to the contract of carriage, and that further modifications could be considered to the drafting of the draft articles 54 and 55 in order to clarify these concerns. Further, it was suggested that the title of draft article 55 could require adjustment, in addition to modifications that would be necessary to the definitions of "right of control" and "controlling party" in draft article 1.

*Rights and obligations of the parties to the contract of carriage prior to its variation*

18. Concern was expressed that it was unclear in the text of draft article 55 how a variation of the contract resulting from an exercise of the right of control would affect the rights and obligations of the parties to the previously existing contract of carriage. While it was suggested that the application of general contract law would appropriately govern any potential problem, the suggestion was made that specific text should be included in draft article 55 to ensure that any variation to the contract

of carriage did not affect the rights and obligations of the parties to the contract prior to its variation.

*"[negotiable]" transport document or electronic transport record*

19. The question was raised whether to include in the text of draft paragraph 55 (2) reference to "negotiable" transport documents and electronic transport records by including the text that currently appeared in square brackets. The view was expressed that limiting this reference to negotiable transport documents and electronic transport records rendered the rule too narrow. In addition, it was thought that simple deletion of the word "negotiable" as it appeared in square brackets might expand the types of documents too broadly because the term "transport documents" could include such a document that evidences the carrier's receipt of the goods but does not evidence or contain a contract of carriage.

20. The contrary view was also expressed in the Working Group that practical problems could arise if the reference were widened beyond "negotiable" transport documents and electronic transport records, since such documents and records had to be in the possession of the controlling party in order for it to exercise its right of control, but in the case of non-negotiable transport documents or electronic transport records, it was unlikely that the controlling party would be in possession or control of them. Further, it was noted that since negotiable transport documents and electronic transport records had a special character in terms of providing conclusive evidence of the contract of carriage, it was a legal necessity for such variations to be noted thereon, and that such a legal necessity did not exist for non-negotiable transport documents or electronic transport records, variations to which could be governed by commercial practice.

21. It was further suggested that, in the case of non-negotiable transport documents or electronic transport records, the controlling party should be entitled to have a new document or record issued so as to reflect the variation of the contract of carriage. The Working Group agreed that the word "negotiable" should be deleted and that modification of this provision should take into account the concerns raised in the paragraph above, in addition to a consideration of how this provision would operate with draft paragraph 56 (2)(c).

*Conclusions reached by the Working Group regarding draft article 55:*

22. After discussion, the Working Group decided that:

- The Secretariat should be requested to adjust the text of draft article 55 in keeping with the general concerns raised in the discussion as set out in the above paragraphs;
- The exclusivity of the controlling party's exercise of the right of control should be made equally clear in draft articles 54 and 55; and
- The word "negotiable" should be deleted in draft paragraph 55 (2) and further modification of this provision should take into account the concerns raised in the paragraphs above, including the operation of this provision with draft paragraph 56 (2)(c).

**Draft article 56. Applicable rules based on transport document or electronic transport record issued**

*Title*

23. The Working Group agreed that the title of draft article 56 was too cumbersome and should be modified to more accurately and succinctly reflect the contents of the draft provision. One suggestion made in this regard was that the title could be "Controlling parties".

*Draft paragraph 56 (1)(a)—alternative bracketed text*

24. A concern was expressed that draft paragraph 56 (1)(a) might not adequately protect the interests of the FOB seller of the goods when the shipper was the controlling party and the FOB seller was only the consignor, and not the shipper. It was suggested that this concern was adequately addressed under the second alternative bracketed text in draft paragraph 1 (a), since the shipper would have to advise the carrier that the FOB seller was the controlling party, and, additionally, since the shipper would likely be obliged to do so under the contract of sale. The view was also expressed that the question raised would be considered in connection with the chapter on transport documents, since it concerned which documents or records the consignor would be entitled to receive once it had delivered the cargo to the carrier, in order to protect itself in the face of potentially insolvent buyers.

25. There was support for the view in the Working Group that the second alternative bracketed text in draft paragraph 1 (a), "[designates the consignee or another person as the controlling party]", was preferable to the first bracketed text, since it was clearer and more simply drafted.

26. The Working Group heard other suggestions for the clarification of the text. It was proposed that draft paragraph 1 (a) should specify that the "contract of carriage", rather than the "shipper" should designate the controlling party. In response, it was noted that this suggested change would probably have the same result as the current text, since the shipper would likely make such a designation in the contract of carriage. It was also suggested that draft paragraphs 1 (a) and (b) should take into account that under Rule 6 of the Comité Maritime International's Uniform Rules for Sea Waybills, the shipper may transfer the right of control to the consignee, and that the exercise of this option must be noted on the sea waybill or similar document. However, some doubt was expressed regarding this suggestion, since it was thought that the question of the identity of the controlling party was relevant only as between the carrier and the cargo interests, and that if third parties, such as banks, were interested, the parties could advise them accordingly.

*Draft paragraph 56 (1)(b)—alternative bracketed text*

27. There was general agreement in the Working Group that inclusion of the text in the first set of square brackets in draft paragraph 56 (1)(b) was inadequate, since it would render the provision too uncertain for the carrier if it were to allow either the transferor or the transferee to notify the carrier of a transfer of the right of control. While there was some support for the inclusion of the text in the second set of square brackets of draft paragraph 56 (1)(b) as accommodating those jurisdictions where the transferee was allowed to notify the carrier of the transfer of the right of control, doubts were also expressed regarding whether this approach would be

sufficiently clear. It was noted that it would be more easily verified by the carrier if notification of a transfer of the right of control were made by the transferor, who would typically be known to the carrier. A preference was expressed in the Working Group for the deletion of both sets of bracketed alternative text, since allowing the transferee to notify the carrier did not seem to adequately protect all of the relevant interests, nor did it provide sufficient clarity.

28. The suggestion was also made that draft paragraph 56 (1)(b) should express the consequences of a failure to notify the carrier of the transfer of the right of control by stating that the transfer was not effective until the carrier had been notified by the transferor.

*Paragraph 11 of A/CN.9/WG.III/WP.50/Rev.1*

29. The suggestion was made that draft paragraphs 56 (1)(a) and (b) could be replaced by the text that appeared in paragraph 11 of A/CN.9/WG.III/WP.50/Rev.1. While there was some support for that suggestion, some doubts were raised whether the text in A/CN.9/WG.III/WP.50/Rev.1 would adequately cover the situation where the controlling party had to transfer the right of control, particularly in the situation where there were no documents at all. Some support was also expressed for the view that the text in A/CN.9/WG.III/WP.50/Rev.1 could replace draft paragraph 56 (1)(a), but that view did not receive sufficient support in the Working Group.

*Draft paragraph 56 (1)(c)—"in accordance with article 54"*

30. There was general agreement in the Working Group that the phrase "in accordance with article 54" was superfluous, and could be deleted.

*Conclusions reached by the Working Group regarding draft paragraphs 56 (1)(a), (b) and (c):*

31. After discussion, the Working Group decided that:

- The Secretariat should be requested to adjust the title of draft article 56;
- The second alternative bracketed text in draft paragraph 56 (1)(a) was preferable, but the Secretariat should be requested to make the appropriate drafting modifications bearing in the mind the views expressed in the Working Group;
- The alternative text appearing in brackets in draft paragraph 56 (1)(b) should be deleted in its entirety, and the Secretariat should be requested to consider whether the transfer of the right of control should only be effective upon notification of the carrier; and
- The phrase "in accordance with article 54" in draft paragraph 56 (1)(c) should be deleted.

*Draft paragraph 56 (1)(d)—termination or transfer of the right of control*

32. The view was expressed that draft paragraph 56 (1)(d) dealing with the termination of the right of control or, alternatively, its transfer to the consignee, was unnecessary and could be deleted, in light of the fact that the chapeau of draft

article 54 limited the controlling party's entitlement to exercise the right of control to the period of responsibility as set out in draft paragraph 11 (1). However, some doubt was expressed regarding whether deletion of the paragraph was appropriate given the particular problems that could flow from the timing of the termination of the right of control.

33. It was observed that the Working Group had before it three possible approaches to the termination of the right of control or its transfer to the consignee, each of which entailed different consequences. One approach, reflected in the first set of square brackets in draft paragraph 56 (1)(d), was that the right of control terminated when the goods arrived at destination and the consignee requested delivery. A second approach was that reflected in the second set of square brackets in draft paragraph 56 (1)(d), where the right of control was transferred to the consignee when the goods arrived at destination and the consignee requested delivery. It was observed that these two approaches were in keeping with the tradition in many civil law countries, and that these approaches were consistent with several international transport conventions, but that certain practical problems had arisen with respect to them. A third approach was said to be that reflected in the text in paragraph 15 of A/CN.9/WG.III/WP.50/Rev.1, where the right of control terminated when the goods had been delivered.

34. The view was expressed that the timing of the termination of the right of control was the key to deciding the optimum approach to take in the draft convention. It was suggested that if the right of control was not transferred to the consignee or terminated until the last possible moment, such as until actual delivery, it could cause the carrier undue hardship, since the carrier might have already begun the process of delivery and it could be very burdensome to receive last minute instructions from the controlling party regarding changes in delivery once that process had already begun. However, another view was expressed that the right of control should not be terminated or transferred too early, since the most common instruction given by a controlling party to a carrier was an instruction not to deliver the goods until the carrier had confirmed with the seller or controlling party that it had been paid. Strong preferences were expressed in the Working Group for each of these approaches.

35. Several possible solutions were suggested for the resolution of this issue:

(a) The termination of the right of control under draft paragraph 1 (d) could be treated as a non-mandatory right of control provision subject to draft article 60, although some doubts were raised regarding whether this would provide an adequate solution to the problem;

(b) Since draft article 57 set out certain limitations with respect to the carrier's obligation to execute instructions that it received from the controlling party, it was thought that following its consideration of draft article 57, the Working Group might be better placed to reconsider its approach to the termination of the right of control. Further, if draft article 57 provided sufficient protection for the carrier in its obligation to execute instructions from the controlling party, draft paragraph 1 (d) would be less important and could possibly be deleted.

*Conclusions reached by the Working Group regarding draft paragraph 56 (1)(d):*

36. After discussion, the Working Group decided that:

- Draft paragraph 56 (1)(d) should be retained in square brackets for further consideration once the Working Group had considered draft article 57 (see below, paras. 68 to 71).

*Draft paragraphs 56 (2)(a) and (b)*

37. It was suggested that draft paragraph 56 (2)(b) could be deleted as redundant since it was evident that under draft paragraph 56 (2)(a) the holder of the transport document was also the controlling party and that, since the transferee of the transport document would also become holder, the right of control would pass accordingly. A suggestion was also made that the second sentence in draft paragraph 56 (2)(b) could be moved to draft article 61, which contained rules on transfer of rights when a negotiable transport document had been issued.

*Draft paragraph 56 (2)(c)—text in square brackets*

38. It was suggested that the bracketed text in draft paragraph 56 (2)(c) should be deleted. The view was expressed that the provision was redundant since no party could request others to produce documents that the requesting party already held. There was support in the Working Group for this view.

*Draft paragraph 56 (2)(c). "if the carrier so requires"*

39. It was suggested that the words "if the carrier so requires" should be deleted from draft paragraph 56 (2)(c). The view was expressed that, when a negotiable transport document had been issued, the carrier should accept instructions issued pursuant to the right of control only from the holder of that document. In this respect, it was added that, it was the carrier's option to verify that the holder could produce the necessary documents to confirm its identity as the controlling party, and that the carrier would bear any risk arising from a failure to exercise this option. However, it was also indicated that the provision must also affirm that an otherwise valid exercise of the right of control remained valid even if the carrier did not request production of document by the holder.

*Conclusions reached by the Working Group regarding draft paragraph 56 (2):*

40. After discussion, the Working Group decided that:

- The text of draft paragraph 56 (2) as contained in A/CN.9/WG.III/WP.56, after deletion of the words "if the carrier so requires" and of the bracketed text in draft paragraph 56 (2)(c), should be retained as a basis for the Working Group's future deliberations;

- The Secretariat should prepare a new version of draft paragraph 56 (2) taking into account the above deliberations, including the possible drafting suggestion of combining the contents of draft paragraphs (a) and (b).

*Draft paragraph 56 (3)*

41. In light of its deliberations on draft paragraph 56 (2)(c), the Working Group decided that the text of draft paragraph 56 (3) as contained in A/CN.9/WG.III/WP.56, after deletion of the words "if the carrier so requires" in draft paragraph 56 (3)(b), should be retained as a basis for the Working Group's future deliberations.

*Draft paragraph 56 (4)*

42. In response to a query on the purpose of draft paragraph 56 (4), it was explained that the draft provision aimed at creating a parallelism with draft paragraph 62 (1), according to which any holder that was not the shipper and that did not exercise any right under the contract of carriage, did not assume any liability under the contract of carriage solely by reason of being a holder. Accordingly, it was thought that no liability under this provision should be imposed on a transferor of the right of control pursuant to its position as controlling party if the transferor did not exercise its right of control. However, it was also observed that this approach did not fit comfortably with that taken in draft article 34 in the chapter on shipper's obligations, where the holder of the transport document or electronic transport record that was identified as the "shipper" in the contract particulars was subject to the responsibilities and liabilities imposed on the shipper under that chapter, and that therefore the interaction of that draft provision with draft paragraph 56 (4) should be clarified.

43. It was suggested that the word "liabilities" in draft paragraph 56 (4) should be replaced by the term "obligations" since only the obligations should be transferred along with the transfer of the right of control, while any liabilities arising from the exercise of that right of control would always remain with the party that had incurred them. However, it was noted that the word "liability" was the proper term to be used in draft paragraph 56 (4) given its precise meaning in draft article 34 of the draft convention, to which draft paragraph 56 (4) referred. Furthermore, it was indicated that the proposed amendment could render the draft provision redundant since draft article 62 already provided that obligations would pass with the transfer of the document.

44. Several additional drafting suggestions were made regarding the treatment of draft paragraph 56 (4), including deletion of the entire provision and a rephrasing of it in a positive sense to say which aspects of the right of control were transferred, rather than in its current negative sense. The view was also expressed that the Working Group's consideration of draft paragraph 62 (1) could assist it in coming to a decision regarding draft paragraph 56 (4).

*Conclusions reached by the Working Group regarding draft paragraph 56 (4):*

45. After discussion, the Working Group decided that:

- The text of draft paragraph 56 (4) should be placed in square brackets pending its possible modification by the Secretariat or its deletion, following further consideration of the issues raised and consideration of the text in draft paragraph 62 (1).

**Draft article 57. Carrier's execution of instruction**

*Draft paragraph 57 (1)—Variant A or Variant B*

46. The Working Group heard the view that there were two main substantive differences between Variants A and B of draft paragraph 57 (1) which established the circumstances under which the carrier was required to execute the instructions of the controlling party. The first difference was thought to be the reference in draft paragraph 1 (a) of Variant B that the controlling party was entitled to exercise the right of control, and the second, more substantive difference was said to be draft paragraph 1 (c) of Variant A, that made reference to additional expense, loss or damage that the carrier or performing party might incur in the execution of the instructions from the performing party. It was suggested that the safeguards for the carrier such as those set out in draft paragraph 1 (c) of Variant A were important and should be retained, but that they might be sufficiently expressed in draft article 57 (3).

47. While there were expressions of support for Variant A, which expressly allowed the carrier to refuse to carry out instructions that carried an additional expense, loss or damage to the carrier or to any other goods on the same voyage, a strong preference was expressed in the Working Group for Variant B of draft paragraph 57 (1).

48. Following specific discussion regarding Variant B of draft paragraph 57 (1), the Working Group decided to delete reference to the performing party in subparagraph (c) in keeping with its previous decision to exclude performing parties from the right of control provisions. In addition, a drafting suggestion was made to merge subparagraphs (b) and (c), since their content was thought to be quite similar. In response to the concern that the flexible standards of subparagraphs (b) and (c) might not be objectively interpreted in determining the reasonableness of a carrier's failure to execute instructions, it was suggested that the principle in draft article 1 bis from Variant A could be adopted into Variant B. However, it was indicated that the reasonableness test in draft paragraph 1 bis of Variant A would not of itself render more objective the interpretation of the standards in subparagraphs (b) and (c). It was observed that a carrier's right to refuse to execute instructions would ultimately involve a determination of a reasonableness standard in either suggested variant of draft paragraph 57 (1). In addition, it was suggested that the burden of proof for the carrier's failure to execute the instructions should be dealt with in draft paragraph 57 (4).

*Conclusions reached by the Working Group regarding draft paragraph 57 (1):*

49. After discussion, the Working Group decided that:

- The text of Variant B of draft paragraph 1 was preferable to that of Variant A; and
- The Secretariat would take into account drafting suggestions made with a view to improving the text (see also para. 51 below).

*Draft paragraph 57 (2)*

50. There was agreement in the Working Group that in keeping with decisions made previously, reference in draft paragraph 57 (2) to persons outside of the controlling party and carrier should be deleted. However, there was some support for the concern raised that revising the text of draft paragraph 57 (2) in this fashion could result in the inability of the carrier to obtain reimbursement for any damages that it might have to pay to other shippers resulting from loss or damage caused to their goods by the execution of the controlling party's instructions. Following from this suggestion, a view was expressed that it might be necessary to include a reference in draft paragraph 1 allowing the carrier to decline execution of the instructions if such execution would cause damage to the goods of other shippers, but it was thought that a more appropriate solution would be to clarify that in draft paragraph 57 (2), the carrier had the right to be reimbursed for any damages that it was required to pay to third parties.

*Conclusions reached by the Working Group regarding draft paragraph 57 (2):*

51. After discussion, the Working Group decided that:

- Reference to parties other than the controlling party and the carrier should be deleted from draft paragraph 2;
- Care must be taken in the modification of the text that the right of the carrier to claim reimbursement for damages paid to other shippers as a result of the execution of the instructions was retained; and
- The Secretariat would be requested to consider whether it was necessary to include any reference to possible damage caused to the goods of other shippers in draft paragraph 57 (1).

*Draft paragraph 57 (3)*

52. There was general agreement in the Working Group that the first sentence of draft paragraph 57 (3) should be deleted, but that the text in square brackets should be retained and the brackets removed. It was noted that the purpose of deleting the first sentence was to avoid duplication, but it was suggested that the content of the first sentence regarding the amount of security that must be provided by the controlling party should be maintained.

53. Some concerns were expressed regarding the intention of draft paragraph 57 (3)(b), since it was thought that by requesting the security, the carrier was indicating its intention to carry out the instruction, and that the carrier was not entitled to refuse to execute instructions based on expense pursuant to Variant B of draft paragraph 57 (1). The suggestion was therefore made to delete draft paragraph 57 (3)(b). However, there was support for the opposing view that the principle in draft paragraph 57 (3)(b) was still useful in light of the ability of the carrier to decline to execute instructions that interfered with its normal operations, although the drafting in this regard could be clarified. An additional clarification was suggested of the implied right of the carrier to refuse execution of the instructions if security was not provided by the controlling party.

*Conclusions reached by the Working Group regarding draft paragraph 57 (3):*

54. After discussion, the Working Group decided that the Secretariat should be requested to modify the text such that:

- The text appearing in square brackets should be retained and the brackets deleted;
- The first sentence of the draft paragraph should be deleted but the principle regarding the amount of security that must be provided should be maintained in a revised draft; and
- The text of subparagraph (b) should be clarified or replaced to indicate that the carrier may refuse to execute the instruction if no security is provided.

*Draft paragraph 57 (4)*

55. The Working Group was reminded that the nature of the liability of the carrier for non-execution of the instructions of the controlling party and any limitation on that liability, as well as questions of burden of proof, were intended to be discussed in relation to draft paragraph 57 (4). The view was expressed that the text of draft paragraph 57 (4) proposed in paragraph 20 of A/CN.9/WG.III/WP.50/Rev.1 was an improvement on the existing text in the draft convention, since it clarified the basis of liability and the limitation on that liability.

56. By way of further clarification, the view was expressed that physical loss or damage that arose in connection with the carrier's failure to comply with instructions would be covered by the general provisions of draft article 17 of the draft convention. To the extent that losses were physical, it was thought that draft paragraph 57 (4) could be deleted in deference to the general liability rules. However, it was noted that such losses were more likely to be economic losses rather than physical ones, such as, for example, losses resulting from a failure to unload the goods at a scheduled or programmed port of call entailing a subsequent sale at a reduced profit. It was indicated that the text of draft paragraph 57 (4) did not adequately deal with the possibility of economic loss, and that deletion of the text to rely on the general liability provisions would not solve the problem either. There was general agreement in the Working Group that in light of the very complicated provisions that would be required to cover economic loss, the economic loss in this regard should be left to national law. While it was thought by some that simple deletion of draft paragraph 57 (4) would subject the physical loss aspect to the general liability and limitation provisions and the economic loss aspect to national law as intended by the Working Group, there was support for the view that provisions clarifying this intention should be prepared for further consideration. In addition, it was thought that a more general provision leaving economic loss to be governed by national law might be necessary elsewhere in the draft convention, and that issue was left for future consideration by the Working Group.

57. There was some support for the view that if the issue of economic loss was left to national law, that the issue of limitation of economic loss would also have to be left to national law. The Working Group took note of this suggestion for future consideration.

*Conclusions reached by the Working Group regarding draft paragraph 57 (4):*

58. After discussion, the Working Group decided that:

- The current text of draft paragraph 57 (4) should be deleted; and
- The Secretariat should be requested to prepare text for the consideration of the Working Group indicating that physical losses under this provision should be covered by the general liability rules and the rules on limitation of liability, and that economic losses should be governed by national law.

**Draft article 58. Deemed delivery**

59. The Working Group approved the substance of draft article 58.

**Draft article 59. Obligation to provide information, instructions or documents to carrier**

*Questions regarding scope of and need for draft article 59*

60. The following questions concerning the scope of, and need for, the draft article were raised:

(a) The controlling party might not necessarily have a vested interest in the cargo and, therefore, it might not always be the party best placed to provide the carrier with the required information;

(b) Since the controlling party did not need to give its assent to its designation as controlling party and might even be unaware of its designation, it was not appropriate to impose on the controlling party the type of obligations provided for in the draft article;

(c) The draft article referred not only to information, but also to "instructions or documents", not all of which might necessarily be available to the controlling party;

(d) The relationship between the information referred to in the draft article and the information that the shipper was already required to provide under draft paragraph 30 (a) was not clear;

(e) It might not be appropriate to request, in the second sentence of the draft article, that the shipper should provide information not obtained from the controlling party, since the shipper, at the time the need for information arose, might no longer have an interest in the carriage, for instance because the information related to instructions for unloading pursuant to special delivery requests made by the controlling party;

(f) It was not clear what might be the consequences of failure by the controlling party or the shipper to provide the information sought by the carrier; and

(g) Only the carrier, as party to the contract of carriage, and not the performing party, should have the right to request additional information, instructions or documents.

*Responses to issues regarding scope and need for draft article 59*

61. In response to those questions, strong support was expressed for the principle reflected in the draft article, as it was crucial for the carrier to be able to turn to a specific party to obtain information that became necessary after the carrier had taken the goods in its custody. Such information might be needed, for instance, with a view to carrying out instructions given under draft article 54 or as a result of supervening facts (e.g. a strike at the port of unloading or the need for special measures to preserve the goods). Furthermore, it was pointed out that:

(a) The designation of a controlling party would typically occur pursuant to the sales contract or documentary credit so that a buyer/consignee or a bank issuing a letter of credit could usually be expected to have anticipated such possibility;

(b) Even when a controlling party had not expressly accepted its designation as controlling party, or was unaware of the designation, the controlling party could normally be assumed to have an interest in preserving the goods, for instance because it had purchased them or had a security interest in them;

(c) The position of the performing party was different in the context of draft article 59 as compared with other provisions in which reference to the performing party was easily deleted as being outside of the contractual relationship, and thus the reference could be maintained to the maritime performing party; and

(d) The availability of the information, instructions or documents could be taken into account through the addition of the phrase "if available" to ease the burden on the controlling party.

*Consequences of failure to provide the information sought*

62. As regards the consequences of failure by the controlling party or the shipper to provide the information sought by the carrier, the following possibilities were noted:

(a) The carrier would be excused from liability for damage to the goods or delay in their delivery that resulted from lack of the information contemplated by the draft article. This would flow from the general liability regime under article 17 and would not require special rules under draft article 59;

(b) The carrier might have the right to refuse to carry out instructions given under draft article 54 unless and until the controlling party or the shipper provided the information it sought pursuant to draft article 59. This consequence might be implied by the requirement, in draft article 57, paragraph 1, Variant B, (b), that instructions given to the carrier could be reasonably executed, but it was suggested that the Working Group might wish to consider further clarification in due course.

*Prevailing view and additional drafting suggestions*

63. The prevailing view that emerged within the Working Group was that the draft article provided a useful rule to address a concrete problem and that its substance should be retained. However, certain questions remained regarding the possible overlap of this provision with the draft paragraph 30 (a) shipper's obligation to provide information, and the appropriateness of making this ability to access information an obligation of the controlling party. As a possible solution to these

problems, it was suggested that the title of the draft article could be adjusted to reflect its scope with respect to the provision of additional information, and the text of the provision could be redrafted to provide for slightly different obligations on the controlling party that was active, or exercised its right of control, and the controlling party that did not exercise its right of control.

*Conclusions reached by the Working Group regarding draft article 59:*

64. The Working Group decided that:

- The substance of draft article 59 should be retained;
- The title of the draft article should be examined for adjustment to differentiate it from that of draft article 30 by referring to "additional" information, instructions or documents and by removing the reference to "obligations";
- The reference to the performing party should be retained and examined with a view to determining if it was necessary with respect to this provision; and
- The Secretariat should be requested to reformulate the draft article, taking into account the above deliberations, for consideration by the Working Group at a later stage.

**Draft article 60. Variation by agreement**

*Expansion of the list of non-mandatory provisions subject to variation*

65. While the Working Group was generally of the view that the content of draft article 60 was acceptable, the view was expressed that the list of provisions that were capable of variation by agreement should be expanded, particularly in light of the commercial nature of the draft convention, and unless there was a requirement for mandatory provisions to protect certain parties. Particular provisions mentioned for possible inclusion within draft article 60 were said to be draft paragraph 56 (1)(a), draft paragraph 56 (1)(d) and draft article 59. However, there was support for the view that a cautious approach should be taken to adding to the list of non-mandatory provisions in draft article 60, since there were relevant parties that needed protection in regard to these provisions, such as the consignee or a later holder of a bill of lading. It was generally agreed that the possibility of adding provisions to draft article 60 should be examined carefully on an article by article basis.

*Possibility of overlap with draft paragraph 55 (2)*

66. The attention of the Working Group was drawn to the possibility that the second sentence of draft article 60 requiring that any variation by agreement be stated or incorporated in the contract particulars might overlap slightly with draft paragraph 55 (2) requiring the notation of variations to the contract of carriage on the transport document or the electronic transport record.

*Conclusions reached by the Working Group regarding draft article 60:*

67. After discussion, the Working Group decided that:

- The possibility of adding provisions to the list of non-mandatory provisions in draft article 60 would be undertaken on an article by article basis; and

- The Secretariat would examine the possibility of any overlap with draft paragraph 55 (2) in its preparation of a text.

**Reconsideration of draft paragraph 56 (1)(d) and proposed compromise approach**

68. Having reached the conclusion of its consideration of Chapter 11 on Right of Control, the Working Group reverted as agreed to its consideration of draft paragraph 56 (1)(d) concerning the termination of the right of control or its transfer to the consignee (see para. 36 above). With particular emphasis on the strongly held opposing views expressed in this regard in the Working Group, the following compromise approach to draft paragraph 56 (1)(d) was suggested:

(a) The duration of the right of control should be extended slightly from the text in A/CN.9/WG.III/WP.56 to terminate upon actual delivery of the goods, in keeping with the proposed text in paragraph 15 of A/CN.9/WG.III/WP.50/Rev.1;

(b) Draft article 56 (1)(d) should be added to the list of non-mandatory provisions in draft article 60, enabling parties to agree to shorten the duration of the right of control; and

(c) Variant B of draft paragraph 57 (1)(c) should be amended slightly to include the delivery process in the provision allowing for non-execution of instructions by the carrier where there was interference with its normal operations.

69. By way of explanation to questions raised regarding the intended operation of this compromise approach, it was clarified that the default rule for the termination of the right of control upon actual delivery would be expressed in draft paragraph 56 (1)(d), but that the duration of the right of control could be varied by the agreement of the parties through the use of draft article 60. It was further explained that the reference to the delivery process in Variant B of draft paragraph 57 (1)(c) was intended as an additional protection against unduly burdening the carrier by allowing it to decline to execute instructions received from the controlling party once the carrier had begun the delivery process.

70. While some delegations expressed a preference to see the text of the compromise prior to endorsing it, there was strong support for the compromise approach in general. The view was reiterated by some that the duration of the right of control was already set out in the chapeau of draft article 54, and that a text in draft paragraph 56 (1)(d) setting out when the right of control terminated was not necessary. However, it was observed that including the provision as a non-mandatory one in draft article 60 would require that there be specific text setting out the termination of the right of control. Other views were expressed that specific reference in Variant B of draft paragraph 57 (1)(c) to the delivery process was unnecessary since the concept was already included in the normal operations of the carrier. As a drafting matter, it was observed that in preparing the required drafting modifications to implement the proposed compromise, the question of possible overlap regarding the notation of variations to the contract of carriage on the transport document or electronic transport record resulting from the interplay of draft paragraph 55 (2) and draft article 60 would also have to be considered.

*Conclusions reached by the Working Group regarding draft paragraph 56 (1)(d):*

71. After discussion, the Working Group decided that:

- The Secretariat should be requested to draft text implementing the compromise approach set out in paragraph 68 above, with due care to the specific drafting issues raised in that connection.

## Substantive topics considered for inclusion in the draft convention

72. Prior to continuing with the next topic scheduled for consideration by the Working Group (see A/CN.9/WG.III/WP.60, para. 26), a proposal was made regarding a reconsideration of the substantive topics currently being considered for inclusion in the draft convention. It was observed that pursuant to the most recent time frame set out by the Commission for the completion of the work of Working Group III,[2] there were certain time pressures on the Working Group to complete its work on the draft convention. While it was observed that all of the substantive topics currently included in the draft convention were considered important and worthy of efforts toward achieving international legal harmonization, some were more contentious than others and required more detailed treatment, and were thus possibly not well-suited for inclusion in the draft convention. It was further suggested that while these topics were important, they did not belong in the same group as the core subjects of the draft convention, which included provisions such as those with respect to the liability regime and to electronic commerce. It was thought that the more difficult and complex issues, for example, the right of retention of the goods, liens, the position of third parties to the contract of carriage, transfer of liabilities and freight, might better be considered at greater length and for possible inclusion in another type of international instrument, such as a model law.

73. The advantages of placing some of the more difficult issues in the draft convention on an agenda for future and separate work outside of the draft convention were said to be several:

(a) The text of the draft convention would be simplified and streamlined;

(b) The text of the draft convention could be capable of broader acceptance;

(c) The more complicated legal issues could be treated more suitably under a more flexible international legal instrument such as a model law;

(d) Additional time could be devoted to the more difficult issues; and

(e) The streamlined draft convention might be more rapidly completed.

74. In light of this general concern, it was proposed that the Working Group could consider recommending to the Commission placing the treatment of these more difficult issues on its agenda for consideration as future work. It was said that if the Working Group approved of this approach, it could request the assistance of the Secretariat in making that recommendation to the Commission.

75. This suggestion received strong support in the Working Group. While it was agreed that any removal of substantive topics from the current draft convention for placement on the list of more complicated topics for future work would require

consultations, the view was expressed that the Working Group could begin immediately to draw up an open and preliminary list of such topics.

*Conclusions reached by the Working Group:*

76. After discussion, the Working Group agreed that certain of the more complicated and difficult issues that were currently treated in the draft convention should be removed from consideration for the time being, and placed on a list for future treatment, possibly by means of a model law or other more flexible international legal instrument.

## Transfer of rights—Chapter 12

77. In light of its decision to defer the consideration of some of the more complex issues until a future date, the Working Group heard that chapter 12 on transfer of rights was one of the topics that should be so deferred. It was further suggested that only draft article 62 should fall into the category of issues that should be deferred for future discussion, and that draft articles 61 and 63 should be considered by the Working Group during its current session. A contrary view was expressed that chapter 12 should be deleted in its entirety from the draft convention. While it was thought to be premature to delete the chapter, there was support in the Working Group for the view that consideration of the entire chapter should be deferred until a future date.

*Conclusions reached by the Working Group:*

78. After discussion, the Working Group agreed that its consideration of chapter 12 on transfer of rights should be deferred for future discussion, following consultations.

## Delivery to the consignee—Chapter 10 (*continued*)

79. The Working Group was reminded that its most recent consideration of draft chapter 10 on delivery to the consignee had commenced at its sixteenth session (see A/CN.9/591, paras. 188 to 239) but that it had been interrupted due to time constraints until the current session. It was also recalled that the most recent complete consideration of the topic by the Working Group took place during its eleventh session (see A/CN.9/526, paras. 62 to 99), and that a document containing information relating to delivery had been presented by the delegation of the Netherlands at the Working Group's sixteenth session (A/CN.9/WG.III/WP.57).

### Draft article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued

*Draft paragraph 49 (c)*

80. The Working Group resumed its deliberations on draft chapter 10 commencing with draft paragraph 49 (c), continuing on from its deliberations at its sixteenth session (see A/CN.9/591, para. 239). It was indicated that draft paragraph 49 (c) aimed at addressing a specific systemic problem faced by carriers where they were

pressured to deliver the goods to the consignee without presentation of the negotiable transport document or negotiable electronic transport record. It was noted that this practice was fairly common in certain trades, not only in those cases when a negotiable transport document was not available for presentation due to delays, for instance, in the credit system, but also in cases where the nature of the bill of lading was so misused that no bill of lading could be available in the port of discharge, as was common in the oil trade. In such cases, draft paragraph 49 (c) was intended to provide comfort to the carrier by discharging it from its obligation to deliver the goods to the holder.

81. Some concerns were raised regarding the operation of draft paragraph 49 (c), since it would run counter to the long-standing principle of requiring the presentation of the bill of lading to obtain receipt of the goods. A further problem was said to be that since the bill of lading would continue to be in circulation, a holder could later appear and ask for delivery of the goods. Some concern was also expressed regarding the consistency of the regime in the draft convention, since under the draft chapter on right of control, the controlling party under the draft convention was required to produce the negotiable document to the carrier in order to exercise its right of control and give instructions to the carrier, so that the carrier would always be aware that the controlling party was also the holder of the negotiable document.

82. In response, it was pointed out that the regime was intended to prevent abuses of the bill of lading system, for example, those relating to the deliberate non-production of documents of title in order to use them as promissory notes without a maturity date, and that the controlling party's production of the bill of lading in order to provide the instructions to the carrier did not necessarily entail surrender of the bill of lading to obtain delivery of the goods. In response to a query regarding whether the FOB seller would be adequately protected, it was said that in the case of an FOB sale, the FOB seller would be protected, because it would also be the holder of the negotiable document or electronic transport record, and therefore it would also be the controlling party that would give delivery instructions to the carrier.

83. There was some support in the Working Group for the deletion of draft paragraph 49 (c). However, the existence of the problem of abuse of the bill of lading system was noted in the Working Group, and there was approval for efforts to find a solution for that problem that would provide some comfort to the carrier. While it was acknowledged that full consideration of draft paragraph 49 (c) would depend upon the Working Group's consideration of the connected provisions in draft paragraphs (d) and (e), support was expressed for draft paragraph 49 (c).

*Conclusions reached by the Working Group regarding draft paragraph 49 (c):*

84. After discussion, the Working Group decided that:

- The text of draft paragraph 49 (c) as contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group's future deliberations.

*Variant A, comprising draft paragraph 49 (d); and Variant B, comprising draft paragraphs 49 (d) and (e)*

85. It was indicated that both variants of draft paragraph 49 (d) were meant to indicate that the holder of the negotiable transport document or negotiable electronic transport record did not retain the right to delivery of the goods after delivery had actually taken place. It was suggested that clarification in the draft might be sought on this point.

86. The view was expressed that Variants A and B of draft paragraph 49 (d) differed considerably, as the text in square brackets in Variant A excluded those cases of delivery of goods without presentation of documents foreseen under draft paragraph 49 (c) from its scope of application, while Variant B explicitly referred to such cases. Therefore, a preference was expressed for Variant B, as it provided additional safeguards for those cases falling under draft paragraph 49 (c). A concern was raised that Variant B could be too narrow, since it might be interpreted to apply only to delivery pursuant to draft paragraph 49 (c), and could thus limit the protection of holders in good faith not included in the scope of draft paragraph 49 (c).

87. Reference was also made to protection of the holder in those cases in which multiple originals of bills of lading were issued. It was noted that in such cases, commercial practice entitled the holder of one of the originals to delivery of the goods, and that this was the situation covered by draft paragraph 49 (a). It was suggested that a requirement that the bill of lading should state on its face the number of multiple originals issued should be inserted in draft paragraph 49 (d) or, alternatively, in draft chapter 9 on transport documents and electronic transport records of the draft convention, as suggested in paragraph 14 of A/CN.9/WG.III/WP.62, and it was suggested that consideration of the topic be deferred until the consideration of chapter 9 (see paras. 227, 230 and 233 below).

88. In response to a query, it was indicated that the reference to "contractual or other arrangement other than the contract of carriage" in draft article 49 (d) was meant to provide protection to all good faith holders of negotiable documents. It was further specified that, in the case of banks under letter of credit transactions, the protection under draft paragraph 49 (d) would extend not only to those cases when the bank had already confirmed the letter and was therefore obliged to accept the negotiable document, but also to those cases when the intermediary bank had only been nominated and therefore did not yet have such an obligation.

*Conclusions reached by the Working Group regarding draft paragraph 49 (d):*

89. After discussion, the Working Group decided that:

- The text of draft paragraphs 49 (d) and (e), i.e. Variant B, as contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group's future deliberations; and that
- The Secretariat should consider drafting modification of Variant B, taking into account the above discussion.

**Draft article 50. Failure to give adequate instructions**

90. It was indicated that draft article 50 was meant to provide the carrier with a safeguard for those cases, not rare in practice, when it could not perform the delivery of the goods due to inadequate instructions from the controlling party or the shipper under draft articles 48 and 49, or to an inability to locate the controlling party or the shipper. It was suggested that the qualification "adequate" to the word "instructions" could give rise to problems of interpretation and that it could possibly be clarified, for example, by specifying that the instructions should be sufficient to allow for delivery of the goods.

91. It was suggested that the reference to draft articles 52 and 53 in draft article 50 should be deleted, while the reference to draft article 51 should be retained since only that provision set out the rights that the carrier could exercise. In response, the view was expressed that draft articles 52 and 53 were relevant for the operation of draft article 50. In particular, it was explained that draft article 52 was meant to provide for those cases in which the transport document incorporated an obligation to give notice of arrival at destination, possibly to a party different from the controlling party, and such notice had not been given.

92. It was suggested that reference to the consignee should be added in the draft provision since after the arrival of the goods at the destination the identity of the controlling party and of the consignee might not coincide.

*Conclusions reached by the Working Group regarding draft article 50:*

93. After discussion, the Working Group decided that:

- The Secretariat should consider drafting modifications of draft article 50 based on the concerns raised in the above discussion.

**Draft article 51. When goods are undeliverable**

94. It was indicated that draft article 51 was intended to provide rights and remedies to the carrier in those cases in which the carrier had tried to deliver goods but was unable to do so, either through the failure of the consignee to accept delivery or because of an inability to deliver the goods to the consignee due to applicable law or regulation.

95. It was suggested that the text of draft article 51 should be expressly linked to draft article 50, so as to avoid the impression that draft article 50 provided the rights indicated to the carrier independently of any failure on the part of the controlling party or the shipper to provide adequate instructions for delivery. Some concerns were raised regarding the relationship between several of the provisions in the chapter on delivery, and there was support for the view that the relationship between draft articles 46, 50, 51 and 53, in particular, should be clarified. The view was also expressed that adjusting the order of certain provisions, such as moving the draft article 52 notice provision in front of draft article 51, or possibly merging it with portions of draft article 51, could assist in clarifying the intended operation of the provisions.

*Draft paragraph 51 (1)*

96. It was observed with respect to draft paragraph 51 (1)(a) that two types of contractual arrangements could be made in connection with the custody of undeliverable goods: a successive contract to store the goods or an agreement by the shipper and carrier not to apply the draft article 51 remedies and to make other arrangements. The view was expressed that the text in square brackets in draft paragraph 51 (1)(a) was not necessary for the creation of a successive contract and that it should be deleted. Further, it was proposed that the other arrangements entered into by the shipper and the carrier could be accommodated by the insertion at an appropriate place in the provision of the phrase "unless otherwise agreed in the contract of carriage". There was support for these proposals, and it was observed that care should be taken with the placement of the phrase "unless otherwise agreed in the contract of carriage" in draft paragraph 51 (1), so as not to create unintended results, such as the modification of draft paragraph 51 (2) through its reference to draft paragraph 51 (1).

*Draft paragraph 51 (2)*

97. It was suggested that in order to further clarify draft paragraph 51 (2)(b), the reference "to act otherwise in respect of the goods" should be qualified to include destruction of goods. There was support in the Working Group for this modification, since often carriers needed to act quickly to destroy goods left in their custody when those goods were perishable or had become dangerous. A question was raised regarding whether this right to destroy the goods was intended to be conditional or unconditional. In addition, it was suggested that a provision on the destruction of the goods should be made subject to the supervision of the local authorities, in similar fashion to text regarding the sale of the goods pursuant to draft paragraph 51 (2)(c).

98. Concern was raised regarding the phrase "in the opinion of the carrier" in draft paragraph 51 (2)(b), particularly if the paragraph was intended to include the destruction of goods as suggested. It was thought that this phrase should be deleted since it made the test too subjective by relying on the opinion of the carrier, but that the remainder of the phrase "as the circumstances reasonably may require" was appropriate and should be kept. While some concern was expressed that deletion of the phrase "in the opinion of the carrier" could be too restrictive to the carrier in situations where it was necessary to make quick decisions, it was thought that the remaining reasonableness test was sufficiently flexible to be properly applied in such circumstances. A further proposal was made to apply the "reasonable circumstances" condition to paragraphs (a) and (c) of draft paragraph 51 (2) as well as to paragraph (b). The view was expressed that in determining the appropriate test for this provision, the context should be kept in mind, in that it did not concern disposal of the goods during the contract of carriage, but rather it gave the carrier the rights necessary to deal with the goods left in its custody after it had completed its obligations under the contract of carriage.

*Conclusions reached by the Working Group regarding draft paragraphs 51 (1) and (2):*

99. After discussion, the Working Group decided that:

- The text in square brackets in draft paragraph 51 (1)(a) should be deleted;
- The phrase "unless otherwise agreed in the contract of carriage" should be inserted at a suitable place into the text of draft paragraph 51 (1)(a);
- A provision on the destruction of goods should be added to draft paragraph 51 (2)(b), and consideration should be given to requiring such disposal to be in the presence of local authorities;
- The phrase "in the opinion of the carrier" in draft paragraph 51 (2)(b) should be deleted;
- The title of the draft article should be adjusted to better reflect its content;
- The order of the provisions in the draft chapter on delivery and their interrelationship should be examined for possible clarification and adjustment, particularly in the case of the placement of draft article 52;
- The Secretariat should be requested to consider and prepare the necessary modifications to the text, in light of the above discussion.

*Draft paragraph 51 (3)*

100. Some concern was expressed with respect to the second portion of the text in draft paragraph 51 (3), since it was thought that the phrase "subject to the deduction of any costs incurred in respect of the goods and any other amounts that are due to the carrier" could be interpreted to include amounts owed to the carrier with respect to other shipments of goods. There was support in the Working Group for the view that that was not the intention of the provision, and it was suggested that moving the phrase "in respect of the goods" to the end of the sentence could clarify the text. A question was raised regarding this clarification, and it was suggested that the carrier should have a right to deduct any amounts owed to it from previous carriages from the proceeds of the sale. However, this approach was not accepted, and there was support for the view that the provision should cover those amounts for which the carrier would have a lien against the particular goods in question, and where the debt was unrelated to the goods, the draft convention should make no provision, thereby leaving the matter of set-off to national law.

*Conclusions reached by the Working Group regarding draft paragraph 51 (3):*

101. After discussion, the Working Group decided that:

- There was support for this provision and the Secretariat should be requested to consider modifications to the text to achieve clarification, as indicated in the above discussion; and
- Consideration could be given to the use of the term "unclaimed goods" rather than "undeliverable goods".

**Draft article 52. Notice of arrival at destination**

*Draft article 52*

102. The view was expressed that the current text of the draft article was too restrictive in that it only dealt with notice of arrival of the goods at destination. In practice, however, carriers were often faced with the urgent need for taking protective or other measures in respect of cargo that had not arrived at destination, for instance as a result of a casualty. The draft article, it was suggested, should be widened to cover those situations as well.

103. In response, it was stated that the draft article was intended to be limited to situations where the goods had arrived at destination. The carrier's general duty of care of the cargo, for example, was stated in draft article 14, while the carrier's remedies in respect of goods that might become a danger to cargo were already dealt with in draft article 15 and the carrier's right to obtain instructions from the controlling party was covered by draft article 59. Taken together, those provisions already afforded the carrier the authority needed to act under extraordinary circumstances. It was nevertheless recognized that the interplay between those various provisions might need to be more clearly expressed in a future version of the draft convention.

104. Questions were raised as to whether the carrier should give a specific notice to the appropriate person that it would exercise any of the rights mentioned in draft paragraph 51 (2). In response, it was noted that the purpose of draft article 52 was merely to make the exercise of any rights by the carrier under draft paragraph 51 (2), conditional upon giving reasonable notice to the appropriate person of the arrival of the goods at destination. That is, a carrier could not, for instance, cause unclaimed goods to be sold if it had not notified the appropriate person of the arrival of the goods at destination. Nothing in the draft article required a second notice with specific reference to the measures envisaged by the carrier in respect of the unclaimed goods as a condition for the operation of draft paragraph 51 (2).

105. It was generally agreed that the carrier should not avail itself of draft paragraph 51 (2), if it had failed to give notice of arrival of the goods to the appropriate person. The suggestion was made, in that connection, that the draft convention should expressly require, as a general obligation of the carrier, to make such notice, possibly in a provision to be placed earlier in the text. The Working Group was however reminded of its earlier deliberations in respect of draft article 46, when it had been decided that no general requirement to provide notice of arrival of goods should be made by the draft convention (see A/CN.9/591, para. 214). In addition, it was suggested that the provision should be clarified regarding which order the parties named therein were to be notified.

*Conclusions reached by the Working Group regarding draft article52:*

106. After discussion, the Working Group decided that:

- The substance of the draft article should be retained, but it should be clarified in which order the parties named therein were to be notified; and
- The appropriate placement of the draft article might need to be reconsidered.

**Draft article 53. Carrier's liability for undeliverable goods**

*Possible consolidation with draft article 46*

107. It was noted that both draft article 53 and the second sentence of draft article 46 referred to the liability of the carrier in cases of goods left in the custody of the carrier after their arrival at destination. It was further indicated that, even if the scope of draft article 51, to which draft article 53 referred, was broader than that of draft article 46, the liability of the carrier in draft articles 46 and 53 was of a similar nature. It was therefore proposed that draft article 53 and the second sentence of draft article 46 could be consolidated into a single provision. There was support for this proposal in the Working Group, although it was noted that the liability for the goods would shift at slightly different times pursuant to draft article 46 and to draft article 53.

*Standard of liability*

108. A large number of delegations expressed dissatisfaction with the low standard of liability of the carrier as set out in draft article 53, which required intentional or reckless behaviour to hold the carrier liable for loss of undeliverable goods. At the same time, it was generally felt that the standard of liability should not be as high as that under draft article 17 of the draft convention, on the general liability of the carrier for loss of or damage to the goods during its period of responsibility, since under draft article 53, the carrier was left with the custody of the goods due to the default of the consignee in failing to accept delivery. There was strong support in the Working Group for the view that the standard of liability of the carrier should be somewhere between that of draft article 17 and that of the current text in draft article 53.

109. A number of different views were expressed regarding how the standard of liability of the carrier in the case of a consolidated draft article 46 and draft article 53 should be articulated in the draft convention in order to be interpreted in a similar fashion in all legal systems. Specific proposals in this regard were made as follows:

(a) Gross negligence or "faute grave"; but this concept was thought to be unknown in some jurisdictions;

(b) Reasonable care in the circumstances; but that standard was considered by some to be reminiscent of the standard of due diligence, which was thought to be too high, and it was said that this standard coupled with a fault basis would increase the liability of the carrier in some jurisdictions to a level on a par with draft article 17;

(c) Handling the goods as though they were one's own, or taking care of the goods without gross negligence, although this standard was not widely known; and

(d) Adopting the standard of liability of draft article 17 based on fault, but with an ordinary rather than a reversed burden of proof.

110. While some support was expressed for each of the possibilities listed in the paragraph above, it was thought that no single suggestion had emerged in the course of the discussion which would be capable of a standard interpretation in various legal systems. However, it was felt that there was sufficient agreement in the

Working Group on the standard of liability for the carrier in these circumstances that draft text could be prepared for the consideration of the Working Group.

111. The view was also expressed that a different standard of care for the goods might be required depending upon whether the carrier had kept the undeliverable goods in its custody or had given those goods over to the custody of a third party. It was suggested that, in the first case, the carrier should continue to be liable subject to a stricter standard, while in the second case the carrier should be liable only for fault in the choice of the custodian. However, some doubts were expressed whether there should be any distinction between these two situations, since the carrier's responsibility for the care of the goods was probably not capable of delegation to another party.

*Burden of proof*

112. The issue of the burden of proof of the loss of or damage to the goods under the consolidated article was also considered, and it was suggested that the consignee should bear the burden of proof given the carrier's position of being left in the custody of the goods due to the consignee's failure to accept delivery at the conclusion of the contract of carriage. There was support for that view.

*Conclusions reached by the Working Group regarding draft article 53:*

113. After discussion, the Working Group decided that:

- The text of draft article 53 should be consolidated with the second sentence of draft article 46;
- The standard of care should be higher than that currently expressed in draft article 53, but lower that than expressed in draft article 17, and should be capable of similar interpretation in all legal systems; and
- The Secretariat should prepare a new draft of the draft provision based on the above discussions, as a basis for the Working Group's future deliberations.

**Right of retention**

114. The Working Group was reminded that the introduction of a provision regulating the right of the carrier to retain the cargo in certain cases had been suggested at its sixteenth session during the discussion of chapter 10 of the draft convention on delivery to the consignee (see A/CN.9/591, paras. 221 and 222). It was further recalled that a proposal on the carrier's right of retention of the goods had been presented for the consideration of the Working Group at its current session (A/CN.9/WG.III/WP.63).

115. It was indicated that, while substantive provisions on the right of retention could be considered by the Working Group as part of the more complete set of issues to be set aside for possible future work, the carrier's absolute obligation to deliver the goods pursuant to draft article 13 of the draft convention could be interpreted as preventing the application by the carrier of a right of retention arising from other applicable law. It was therefore proposed that a provision specifying the non-interference of the draft convention with the right of retention in other applicable law should be inserted in the draft convention. It was further suggested that such a new provision should be drafted along the lines of the text contained in

paragraph 14 of A/CN.9/WG.III/WP.63, bearing in mind the similar approach taken in draft article 87 of the draft convention, relating to provisions on general average. There was support in the Working Group for this proposal, including a suggestion that the Secretariat should consider the most appropriate location for the new provision, as well as make drafting adjustments to the text to ensure consistency with the existing provisions of the draft convention, with particular regard to the reference to the maritime performing party in paragraph 14 of A/CN.9/WG.III/WP.63.

116. However, caution was urged against excessive recourse to provisions clarifying the intention of the draft convention to preserve applicable law in relation to matters not specifically regulated, since it was thought that a failure to identify all such instances in the draft convention could lead to the interpretation that in the instances not specifically mentioned, the draft convention did intend to interfere with the applicable law.

*Conclusions reached by the Working Group:*

117. After discussion, the Working Group decided that:

- The Secretariat should draft a new provision on right of retention based on the above discussions, and, in particular, on the text contained in paragraph 14 of A/CN.9/WG.III/WP.63, for appropriate placement in the draft convention.

**Liability of the carrier and the shipper for a breach of obligation under the draft convention not expressly dealt with**

118. The Working Group was informed that, in connection with informal consultations that took place in connection with the topic of delivery to the consignee, the question was raised whether the draft convention should contain a general provision on the liability of the carrier and the shipper for a breach of obligation under the draft convention not expressly dealt with in the draft convention (see A/CN.9/WG.III/WP.57, paras. 49 to 52).

119. It was suggested that such general provision might be useful to address certain instances such as, for example, cases of misdelivery. However, it was also indicated that, while the adoption of such a provision might in principle have some merit, its drafting might prove to be excessively complex and time-consuming, and that the final text could add to the overall burden of the draft convention. It was further suggested that the matter should be left to domestic law, and that certain specific matters, such as, for instance, those relating to limitation of liability for misdelivery, might be better addressed in the chapter on limitation of liability in the draft convention.

*Conclusions reached by the Working Group:*

120. After discussion, the Working Group decided that:

- A general provision on the liability of the carrier and the shipper not expressly dealt with in the draft convention should not be inserted in the draft convention.

## Scope of application, freedom of contract and related provisions

121. The Working Group was reminded that it had most recently considered the topics of scope of application and freedom of contract at its fourteenth and fifteenth sessions (see A/CN.9/572, paras. 81 to 104, and A/CN.9/576, paras. 10 to 109). It was also recalled that proposals concerning the scope of application, freedom of contract and related provisions had been presented for the consideration of the Working Group at its current session. (A/CN.9/WG.III/WP.61, A/CN.9/WG.III/WP.65, and A/CN.9/WG.III/WP.70).

122. The Working Group agreed with the suggestion that it should consider scope of application, freedom of contract and related provisions on the basis of the proposed revised text contained in the documents presented (in particular, A/CN.9/WG.III/WP.61) following what were thought to be the key outstanding issues:

(a) Proposed deletion of draft paragraph 8 (1)(c) of the draft convention;

(b) New text proposed to clarify draft article 9 which articulated the scope of application of the draft convention;

(c) New proposed text for draft article 10, on the protection of third parties to contracts of carriage outside of the scope of application of the draft convention, and in particular, whether it was acceptable to define them without reference to transport documents or electronic transport records;

(d) New proposed draft paragraph 20 (5), to further clarify scope of application with respect to maritime performing parties;

(e) Further consideration of draft paragraph 94 (2) on the mandatory application of certain provisions of the draft convention with respect to shippers and other parties;

(f) Modified text of draft paragraph 95 (1), on the conditions for the exercise of freedom of contract in the case of volume contracts;

(g) Further consideration of draft paragraph 95 (4) mandatory provisions of the draft convention from which there could be no derogation;

(h) Modified text of draft paragraph 95 (5)(b), on the conditions under which third parties could consent to be bound by the terms of a volume contract;

(i) The appropriateness of the text of draft paragraph 95 (5)(c) which placed the burden of proof on the party claiming the benefit of the volume contract; and

(j) Any additional issues regarding the scope of application and freedom of contract that were of concern to the Working Group

### Draft article 8. General scope of application

123. The Working Group considered the text of draft article 8 as found in the annexes to A/CN.9/WG.III/WP.56, and in light of the adjustments to that text as proposed in paragraphs 19 to 22 of A/CN.9/WG.III/WP.61. There was support in the Working Group for the proposal that the brackets around the phrases "port of loading" and "port of discharge" in draft paragraphs 8 (1)(a) and (b) should be

removed and the text retained in order to be consistent with the adoption of those connecting factors as a basis for jurisdiction in claims against a carrier (see A/CN.9/WG.III/WP.61, para. 21). Concern was expressed regarding the proposed deletion of the phrases with respect to the internationality of the sea leg currently found in square brackets in the chapeau of draft paragraph 8 (1), and their suggested replacement with an appropriate explanatory note to the draft convention.

*Draft paragraph 8 (1)(c). Contractual incorporation of the draft convention or the governing law*

124. The Working Group was reminded that it had last considered draft paragraph 8 (1)(c) at its fifteenth session (A/CN.9/576, para. 61), at which time the Working Group had not reached a decision concerning whether to delete or to retain draft paragraph 8 (1)(c). The Working Group heard that those issues were further explored in document A/CN.9/WG.III/WP.65, which was intended to be of assistance to the Working Group in making a decision in this regard. It was recalled that the text of draft paragraph 8 (1)(c) had been taken from article 10 (c) of the Hague-Visby Rules, which had been inserted therein by the Visby Amendment in order to expand the rather limited geographical scope of application of the Hague Rules.

125. The view was expressed that the current broad scope of application of the draft convention did not require a provision such as draft paragraph 8 (1)(c) to further broaden it, particularly when the problems that such an inclusion could create might outweigh the benefits of the slightly expanded scope of application. Such problems were thought to include:

(a) Perpetuating the differences in the interpretation of the text that have arisen with respect to the Hague-Visby Rules, particularly regarding whether the provision was intended as a choice of law rule, or whether it simply referred to the substantive incorporation of the provisions of the draft convention by the parties to the contract of carriage;

(b) Creating a possible conflict in regard to the many procedural rules in the draft convention's chapters on jurisdiction and arbitration, which would normally be governed by the *lex fori* rather than by the law of the State chosen in the contract of carriage;

(c) The maritime performing party could be in the questionable position of being subject to the draft convention even though it may have performed its duties during carriage between non-contracting States;

(d) Certain countries had experienced difficulties at the constitutional level as a result of the rule in issue, since parties could use it as an opportunity to avoid having a contract of carriage be governed by the mandatory law or public order rules of the contracting State; and

(e) The law giving effect to the draft convention under draft paragraph 8 (1)(c) could differ from the provisions of the draft convention, thus creating further potential conflicts.

126. In addition to the potential creation of the problems cited above through the insertion of draft paragraph 8 (1)(c), it was suggested that its deletion would not prevent parties from incorporating the draft convention into the terms of their

contract of carriage, subject to the limits of applicable law. In view of these factors, there was support in the Working Group for the deletion of draft paragraph 8 (1)(c).

127. On the other hand, some support was also expressed for the retention of draft paragraph 8 (1)(c). In addition to allowing for a slightly broader scope of application of the draft convention, it was suggested that failure to include the provision could result in the somewhat complicated situation for the carrier where a single voyage with ports of call in different contracting and non-contracting States could result in subjecting only some of the cargo on board to coverage by the draft convention. Further advantages of retaining draft paragraph 8 (1)(c) were said to be greater clarity that the parties could apply the draft convention by virtue of a choice of law, and further, that in those jurisdictions that had a court of cassation, the application of the draft convention by virtue of choice of law would enable it to review the case under the draft convention as a matter of law.

*Conclusions reached by the Working Group regarding draft article 8:*

128. After discussion, the Working Group decided that:

- The brackets around the words "port of loading" and "port of discharge" in draft paragraphs 8 (1)(a) and (b) should be removed and the text retained; and
- Draft paragraph 8 (1)(c) should be deleted from the text of the draft convention.

**Draft article 9. Specific exclusions and inclusions**

129. The Working Group was reminded that two alternative texts of draft article 9 had been submitted for its consideration (see A/CN.9/WG.III/WP.61, para. 23 and A/CN.9/WG.III/WP.70, para. 6). It was indicated that the aim of the two drafting proposals was to improve the clarity of the text as set out in A/CN.9/WG.III/WP.56, while not affecting the substance of the draft provision relating to specific exclusions from and inclusions in the scope of application of the draft convention. The first proposal would retain the substantive elements of the text in a different formulation, and the second would simplify paragraph (b) by stating that draft article 10 would not apply "(b) to contracts of carriage in non-liner transportation, except where the contract of carriage is documented only by a transport document or an electronic transport record that also evidences the receipt of the goods".

130. It was explained that the text of draft article 9 contained in A/CN.9/WG.III/WP.61, para. 23, aimed at simplifying the provision by stressing the difference between liner and non-liner transportation. In response to a query, it was also explained that the suggested text of draft article 9 no longer referred specifically to volume contracts, since they were included as contracts of carriage by virtue of slightly adjusted definitions (see A/CN.9/WG.III/WP.61, para. 16), and because their nature as volume contracts was relevant only in regard to the freedom of contract provisions where they were mentioned, and not in respect of the scope of application provisions. Some doubts remained about the treatment of volume contracts in the provision as set out in A/CN.9/WG.III/WP.61, and it was thought that further consideration of the issue might be necessary.

131. Appreciation was expressed for the simplified version of draft article 9 proposed in A/CN.9/WG.III/WP.70, which was preferred by some. However, it was

thought that the slightly greater detail of the provision set out in A/CN.9/WG.III/WP.61 would probably result in a greater likelihood of it being more accurately interpreted.

132. Some drafting adjustments were suggested resulting from concerns regarding common commercial usage of terms, including possible clarification of the treatment of the carriage of goods in the bulk and parcel trade, since it was thought that courts in the future might refer to the characteristics of a trade rather than to the transport documents or the underlying party relationships in determining the applicability of the draft convention. Concerns were reiterated over the failure to specifically mention contracts of affreightment and similar contracts. Finally, drafting suggestions were made to clarify the intention and application of the provisions set out in paragraph 2 (b)(i) and (ii).

*Conclusions reached by the Working Group regarding draft article 9:*

133. After discussion, the Working Group decided that:

- The text of draft article 9 contained in A/CN.9/WG.III/WP.61, para. 23, should replace the text of draft article 9 of the draft convention contained in A/CN.9/WG.III/WP.56.

**Draft article 10. Application to certain parties**

134. It was recalled that draft article 10 of the draft convention as set out in A/CN.9/WG.III/WP.56 aimed at providing protection under the draft convention to certain third parties when a contract, such as a charterparty in non-liner transportation, was not within the scope of application of the draft convention. It was also recalled that text intended to clarify draft article 10 was contained in paragraph 36 of A/CN.9/WG.III/WP.61, and the proposal that the Working Group consider text contained in paragraph 6 of A/CN.9/WG.III/WP.70 was withdrawn.

135. A concern was raised that draft article 10 did not deal with protection of third parties under the draft convention, but rather with the extension of the scope of application of the draft convention to third parties, and to an increase in their liabilities and responsibilities. It was added that, for example, draft article 34, which was referred to in square brackets in draft article 10, imposed certain liabilities on the documentary shipper. In response, it was noted that draft article 34 also entitled the documentary shipper to the rights and immunities of the shipper under draft chapters 8 and 14. A suggestion was made for an amendment to clarify the fact that provisions binding a third party bill of lading holder to a charterparty arbitration agreement would be respected.

*Documentary or non-documentary approach*

136. It was indicated that two alternative approaches could be taken to establish the parties to whom the draft convention would apply by virtue of draft article 10: one alternative based on the issuance of a transport document or an electronic transport record and another alternative based on listing the third parties in draft article 10 without requiring the issuance of a transport document or an electronic transport record. It was observed that while the text in A/CN.9/WG.III/WP.56 had adopted a documentary approach, the text of draft article 10 proposed in A/CN.9/WG.III/WP.61 had adopted a non-documentary approach. It was explained

that the proposal for a non-documentary approach was based on the understanding that there had been a preference expressed earlier by the Working Group for the documentary approach unless the list of third parties that would be included in draft article 10 could clearly be established.

137. It was suggested that the adoption of a non-documentary approach in draft article 10 could better serve the future needs of commercial practice by removing its reliance on a document or an electronic record, and allowing for developments in electronic commerce. It was added that the concern to maintain a documentary requirement in draft article 10 appeared to have less urgency in the draft convention in light of the fact that the document referred to could also be non-negotiable. However, some hesitation was expressed with respect to abandoning the documentary approach in draft article 10 without careful consideration of the possible consequences of such a major change in the current system.

*Retention of a reference to the person referred to in article 34*

138. It was noted that draft article 10 in A/CN.9/WG.III/WP.61 contained in square brackets a reference to the documentary shipper as identified in draft article 34. Some preference was expressed for the inclusion of such a reference in the list of persons in draft article 10, since that person was not a party to the contract of carriage, but would assume certain obligations of the shipper, and should have a right to the protection offered by inclusion in draft article 10. However, the contrary view was also held that the documentary shipper assumed all of the liabilities and responsibilities of the shipper pursuant to draft article 34, and including a specific reference to the documentary shipper in draft article 10 could cause difficulties in interpretation if the documentary shipper were treated differently from the shipper.

*Variant A or Variant B in draft paragraphs 10 (a) and (b)*

139. It was further noted that draft paragraphs 10 (a) and (b) in A/CN.9/WG.III/WP.61 contained two sets of bracketed language: Variant A referring to the original parties of the contract of carriage, and Variant B referring to the carrier and shipper. It was suggested that reference to "carrier" and "shipper" would be preferable as these terms were defined in the draft convention, while that was not the case for "original parties". However, the view was also expressed that the terms "carrier" and "shipper" might create interpretative difficulties in light of the terms used in commercial practice, for example, in the case of charterparties, where the party was not the shipper or the carrier, but rather an original party to the contract.

*Conclusions reached by the Working Group regarding draft article 10:*

140. After discussion, the Working Group decided that:

- The text of draft article 10 contained in A/CN.9/WG.III/WP.61, paragraph 36, should replace the text of draft article 10 of the draft convention contained in A/CN.9/WG.III/WP.56;
- The consideration of retaining the reference to "the person referred to in draft article 34" in draft article 10 of the draft convention should be deferred until after the consideration of draft article 34; and

- The references to the original parties of the contract of the carriage (Variant A) should be retained in draft paragraphs 10 (a) and (b) and the references to carrier and shipper (Variant B) should be deleted.

**Draft article 20. Liability of maritime performing parties**

141. It was recalled that the insertion of a new paragraph 20 (5), as contained in A/CN.9/WG.III/WP.61, paragraph 44, had been suggested. It was indicated that the draft provision aimed at resolving certain difficulties relating to the interaction between draft article 8, on the general scope of application of the draft convention, and draft article 20, on the liability of maritime performing parties. In particular, the insertion of the draft provision was aimed at avoiding the application of the draft convention to those maritime performing parties that performed their duties completely in non-contracting States.

142. In response to a query, it was explained that the phrases "initially received" and "finally delivered" in draft paragraph 20 (5) were in line with text adopted in draft article 77 (see A/CN.9/591, para. 41), and that the references were intended as clarifications to avoid the application of the draft convention to maritime performing parties that carried the goods from a non-contracting State to another non-contracting State but a trans-shipment occurred at a port of a contracting State during the voyage.

143. In response to another query, it was further explained that draft paragraph 20 (5) made reference to "place" where the goods were received or delivered rather than "port" because a reference to "port" could result in leaving a gap in the scope of application during the maritime performing party's custody of the goods in situations where the maritime performing party received or delivered the goods outside of the port area at an inland location.

144. It was suggested that the text of the draft convention should be considered with a view to identifying other references to maritime performing parties, and ascertaining whether draft paragraph 20 (5) should only exclude the application of draft article 20, or whether it should refer to the entire draft convention.

*Conclusions reached by the Working Group regarding draft article 20 (5):*

145. After discussion, the Working Group decided that:

- The text of draft paragraph 20 (5) contained in A/CN.9/WG.III/WP.61, paragraph 44, should be inserted in the draft convention; and that
- The Secretariat was requested to consider other references to the maritime performing party in the draft convention in order to ensure the appropriateness of the reference to the non-application of "this article".

**Draft article 94 regarding the validity of certain contractual stipulations**

146. The Working Group was reminded of the content of draft article 94, which dealt with the mandatory nature of the draft convention with respect to the obligations and liabilities of the carrier or maritime performing party in paragraph 1, and in paragraph 2, the obligations and liabilities of the shipper, the consignor, the consignee, the controlling party, the holder and the documentary shipper referred to in draft article 34.

*A/CN.9/WG.III/WP.56 or A/CN.9/WG.III/WP.61 version*

147. The Working Group first considered the general question of whether it preferred the text of draft article 94 as set out in A/CN.9/WG.III/WP.56 or that set out in A/CN.9/WG.III/WP.61. The general view held was that the substance of both versions of the text was intended to be the same, but that the drafting of the text as found in paragraph 46 of A/CN.9/WG.III/WP.61 was clearer and was therefore preferable.

*Draft paragraph 94 (2)*

148. The Working Group was reminded of the content of draft paragraph 94 (2), which was in square brackets in both A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.61, and which dealt specifically with the possible mandatory nature of the draft convention with respect to the obligations and liabilities of the shipper, consignor, consignee, controlling party, holder or documentary shipper referred to in draft article 34. The issues raised in this context for consideration by the Working Group were whether or not to retain the whole of the text of draft paragraph 94 (2), and if so, whether to delete or to maintain the phrases "[or increases]" in subparagraphs (a) and (b) thereof.

149. It was suggested that draft paragraph 94 (2) should be deleted in its entirety, since it was thought that, pursuant to commercial law, mandatory provisions were necessary only to protect certain parties, such as those with insufficient bargaining power, and the view was expressed that the parties included in draft paragraph 94 (2) were not in need of such protection. Other reasons were cited for the deletion of draft paragraph 94 (2), such as the view that the necessity for mandatory provisions to protect the shipper and other parties should be assessed on an article by article basis, rather than by way of a general provision such as that of draft paragraph 94 (2). Some support was expressed both for this latter view and for the deletion of draft paragraph 94 (2) in its entirety.

150. The Working Group also heard the view that draft paragraph 94 (2) should be retained, and the square brackets surrounding it should be deleted, since, it was suggested that this provision was an appropriate counterweight to balance the similar provision in draft paragraph 94 (1) established with respect to the obligations and liabilities of the carrier. It was also suggested that not only did shippers and carriers deserve protection under the draft convention, but that consignees did, too, and that such consignees needed to be able to rely on the standards for shippers and carriers set out in the draft convention, without risking deviation from those standards. The view was also expressed that maintaining certain mandatory provisions in the draft convention also assisted with overall smooth and safe operations for the carriage of goods.

151. With regard to the phrase "[or increases]" which appeared in subparagraphs (a) and (b) of draft paragraph 94 (2), the view was expressed that it should be deleted, at least in the case of subparagraph (b), since it was not possible to increase the current unlimited level of the shipper's liability in the draft convention. However, the contrary view was also expressed that the phrase should be maintained in the text and the square brackets deleted in order to protect shippers who were already exposed to unlimited fault-based liability from possible exposure to unlimited strict liability, due to contractual stipulations changing the standard for shipper's

obligations from fault-based liability to strict liability. Some support was expressed for each of these perspectives.

152. It was suggested that consideration of draft paragraph 94 (2) should be suspended until the Working Group had considered draft chapter 8 on shipper's obligations later in the session. While caution was expressed that this course of action would not resolve all of the outstanding issues with respect to draft paragraph 94 (2) since its operation was not limited to shippers, it was thought that reviewing draft chapter 8 could nonetheless be of assistance in this regard.

*Conclusions reached by the Working Group regarding draft article 94:*

153. After discussion, the Working Group decided that:

- The text of draft paragraph 94 (1) could be maintained in the draft convention as it appeared in paragraph 46 of A/CN.9/WG.III/WP.61; and
- Draft paragraph 94 (2) would be maintained as it appeared in paragraph 46 of A/CN.9/WG.III/WP.61 for the moment, and that consideration of its text would be resumed following the Working Group's consideration of draft chapter 8 on shipper's obligations.

**Draft article 95. Special rules for volume contracts**

154. The Working Group was reminded that during its sixteenth session, it had requested the Comité Maritime International to prepare an explanatory document on the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications (see A/CN.9/591, paras. 221 and 244), and that such a document had been prepared in response to that request (A/CN.9/WG.III/WP.66). The Working Group was also reminded of previous work that had taken place during its fifteenth session (see A/CN.9/576, paras. 52 to 104) with respect to the drafting of provisions on volume contracts, which had resulted in the current carefully crafted compromise text in A/CN.9/WG.III/WP.56. Finally, it was also noted that slightly revised text for the provisions on volume contracts was presented for the consideration of the Working Group in A/CN.9/WG.III/WP.61 (see para. 49), but that the slightly revised text was intended only as improved drafting, except where otherwise indicated (see A/CN.9/WG.III/WP.61, paras. 49 to 61).

*Draft paragraph 95 (1)*

155. Notwithstanding the broad agreement on the approach to freedom of contract in volume contracts achieved by the Working Group during its fifteenth session, some concerns were reiterated regarding the possible abuse of volume contracts to derogate from the provisions of the draft convention, particularly in cases where volume contracts could involve a large amount of trade. Concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention, and the view was expressed that a preferable approach would be instead to list specific provisions that could be subject to derogation. Another view was expressed that the combination of the paragraphs 1 and 5 of draft article 95, and of the definition of volume contracts in draft article 1 had addressed earlier concerns regarding sufficient protection for the contracting parties. An additional concern was expressed that while, generally, some freedom of contract was desirable and that volume contracts as such were not necessarily

objectionable, it was possible that draft paragraph (1)(b) did not provide sufficient protection for the parties to such contracts.

156. Overall, strong support was expressed in the Working Group both for the volume contract regime in the draft convention in general, and for the redrafted text of draft paragraph 95 (1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. The view was expressed that the volume contract framework provided a sufficient balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing adequate protection for contracting parties.

*Conclusions reached by the Working Group regarding draft paragraph 95 (1):*

157. After discussion, the Working Group decided that:

- Draft paragraph 95 (1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61 was accepted, both in terms of approach and improved drafting.

*Draft paragraph 95 (4)—Non-derogable provisions*

158. The Working Group next considered the issue of whether it was desirable to include in the volume contract regime of the draft convention a provision containing a list of absolutely mandatory provisions from which there could be no derogation regardless of any agreement, such as that set out in draft paragraph 95 (4) in paragraph 49 of A/CN.9/WG.III/WP.61.

159. Some concern was raised regarding the inclusion of such a provision in the draft convention, since it was felt that it could be used in the later interpretation of the draft convention to reintroduce the notion of overriding obligations that had been carefully avoided in the drafting of the provisions. The view was that the doctrine of overriding obligations could be used in some jurisdictions to override the provisions in the draft convention on the apportionment of liability when there were multiple causes for loss or damage, and that this would be a highly unsatisfactory outcome. Further, the view was expressed that a provision such as draft paragraph 95 (4) would have little practical effect regardless of its inclusion, since it was thought that it would have to include provisions that were clearly mandatory and not capable of being subject to derogation. Another view was expressed that full contractual freedom should be available to the parties to a volume contract, such that the only obligation from which there could be no derogation should be liability for intentional and reckless conduct.

160. However, strong support was expressed for the inclusion of a provision listing the mandatory provisions from which there could never be derogation pursuant to the volume contract regime in the draft convention. The view was expressed that even if there were a danger that the doctrine of overriding obligations could be resurrected with respect to the draft convention, it would be more dangerous to leave the list of absolutely mandatory provisions to be ascertained by judicial interpretation of the draft convention. Further, it was felt that including a provision such as draft paragraph 95 (4) was an important part of the overall compromise intended to provide sufficient protection for contracting parties under the volume contract framework.

*List of provisions in draft paragraph 95 (4)*

161. The Working Group also considered which provisions should be included in the list set out in draft paragraph 95 (4). Some views were expressed that only provisions with a public policy or public order component worthy of protection should be maintained in the list in draft paragraph 95 (4) as, for example, the draft article 16 seaworthiness obligation and the dangerous goods provision in draft article 33. Some doubts were expressed whether the draft article 30 obligation of the shipper to provide information and instructions belonged on the list in draft paragraph 95 (4). Further concerns were expressed as to whether the text referring to draft article 66 was worded as clearly as it could be. While it was thought that parties should not be able to derogate from liability for intentional acts, the articulation of that prohibition was not clear in the text of draft paragraph 95 (4), and could require refined drafting. Some suggestions were made to expand the list of provisions that appeared in draft paragraph 95 (4), for example, by including draft articles 11, 13, 14 (1) and 17. Finally, there was support for the view that all of the references currently in draft paragraph 95 (4) as set out in A/CN.9/WG.III/WP.61 should be kept in the text, and the square brackets removed.

*Conclusions reached by the Working Group regarding draft paragraph 95 (4):*

162. After discussion, the Working Group decided that:

- The text of draft paragraph 95 (4) should be maintained in the draft convention as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61;
- The square brackets that appear in draft paragraph 95 (4) should be removed and the references contained in them retained; and
- The reference to draft article 66 should be maintained and appropriately clarified.

*Draft paragraph 95 (5)(b)*

163. The Working Group considered the modified text of draft paragraph 95 (5)(b), on the conditions under which third parties could consent to be bound by the terms of a volume contract, as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. It was explained that the first sentence of draft paragraph 95 (5)(b) aimed at establishing the principle that third parties would not be bound by the terms of a volume contract under the draft convention unless they expressly consented to be bound by those terms. It was also explained that the second sentence of draft paragraph 95 (5)(b) dealt with matters relating to the proof of such express consent, and, in particular, aimed at avoiding that the acceptance of a document containing standard provisions could be interpreted as amounting to express consent to be bound by the terms of a volume contract that derogated from the draft convention.

164. While it was suggested that the second sentence of draft paragraph 95 (5)(b) should be deleted as unnecessary in light of its first sentence, strong support was expressed for the retention of such second sentence as it provided an important safeguard to third parties by defining the minimum requirements for such consent.

165. In response to a query, it was indicated that third parties that did not express their consent to be bound by the terms of a volume contract pursuant to draft article 95 would receive protection under the general regime of the draft convention,

and would not be bound by the terms of the volume contract that derogated from the draft convention. It was further indicated that, for example, when a volume contract limited the carrier's liability for an amount lower than the one set forth in the draft convention, the third party that had not expressed its consent to be bound by the terms of that contract would not be bound by the lower limitation level therein and would be able to recover the loss to the full amount allowed under the limitation level established by the draft convention. It was suggested, however, that the consequence of an absence of express consent by a third party to the terms of a volume contract should be made explicit in the text of the draft article.

166. Concerns were expressed that the second sentence of draft paragraph 95 (5)(b), on the requirements for the third parties to be bound by a volume contract, could give rise to difficulties of interpretation. It was suggested that the draft provision should more clearly state the two requirements contained therein, i.e., the existence of an obligation of the original party to inform the third party regarding the derogations from the draft convention; and that it was not sufficient for the requirement of express consent that it be set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

167. It was further suggested that draft paragraph 95 (5)(b) should not allow a party that caused the failure of express consent by the third party, for example, by failing to notify the third party of the derogations from the draft convention, to benefit from its own failure by invoking those provisions of the draft convention that would have been displaced by the derogation. It was further explained that, for instance, in a case when the parties to a volume contract had agreed to a limitation of liability for the loss of the goods higher than the one in the draft convention, and the carrier had omitted to inform the third party of that derogation, the carrier should not be able to invoke the lower limit set forth in the draft convention but should be held to the terms agreed in the volume contract, despite the lack of third party consent.

*Conclusions reached by the Working Group regarding draft paragraph 95 (5)(b):*

168. After discussion, the Working Group decided that:

- The policies underlying draft paragraph 95 (5)(b), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, were acceptable; and
- The Secretariat should prepare a new draft of draft paragraph 95 (5)(b) taking into account the views expressed above.

*Draft paragraph 95 (5)(c)*

169. The Working Group considered next the appropriateness of the text of draft paragraph 95 (5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, which placed the burden of proof that a derogation from the draft convention had been validly made on the party invoking the derogation set forth in the volume contract. It was explained that the scope of the draft provision had been expanded in comparison with the same provision contained in the last sentence of draft paragraph 95 (6)(b) of A/CN.9/WG.III/WP.56 so as to extend the rule on the burden of proof to any party claiming the benefit of the derogation. Support was expressed for the new text of draft paragraph 95 (5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61.

*Conclusions reached by the Working Group regarding draft paragraph 95 (5)(c):*

170. After discussion, the Working Group decided that:

- Draft paragraph 95 (5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, was accepted.

**Draft article 96. Special rules for live animals and certain other goods**

171. It was suggested that draft article 96 should be deleted from the draft convention since trade of live animals was a specialized trade that traditionally fell outside of the Hague and Hague-Visby Rules. In response, it was noted that the Working Group had already decided to retain the draft provision (see A/CN.9/572, para. 109). It was further suggested that certain drafting modifications could be prepared bearing in mind the suggestions contained in paragraphs 63 to 67 of A/CN.9/WG.III/WP.61.

*Conclusions reached by the Working Group regarding draft article 96:*

172. After discussion, the Working Group decided that:

- The substance of draft article 96, as it appeared in paragraph 62 of A/CN.9/WG.III/WP.61, was acceptable, bearing in mind any necessary drafting modifications.

## Obligations of the shipper—Chapter 8

173. The Working Group was reminded that it had most recently considered the chapter of the draft convention on shippers' obligations at its thirteenth and sixteenth sessions (see A/CN.9/552, paras. 118 to 161, and A/CN.9/591, paras. 104 to 187, respectively). It was also recalled that proposals concerning the obligations of the shipper had been presented for the consideration of the Working Group at its current session (see A/CN.9/WG.III/WP.67 and A/CN.9/WG.III/WP.69).

174. The Working Group agreed with the suggestion that it should consider shippers' obligations on the basis of the proposed revised text contained in the documents presented along the lines of what were thought to be the key outstanding issues:

(a) Whether draft article 29 on the carrier's obligation to assist the shipper by providing information and instructions should be modified to become the shipper's right to request and obtain reasonable information or to become a general provision based on mutual cooperation between the shipper and the carrier, and whether draft article 18 should be retained in light of that decision;

(b) Whether the application of draft article 29 should be broadened to include application to draft article 30, and possibly to draft article 33;

(c) The appropriate articulation of the obligation in draft paragraph 30 (b) on the shipper's compliance with rules, regulations and other requirements of authorities;

(d) The treatment in the draft convention of consequential damages for delay on the part of both the shipper and the carrier; and

(e) Any additional issues regarding the obligations of the shipper that were of concern to the Working Group.

**Draft article 29. Carrier's obligation to provide information and instructions**

175. The Working Group heard that there were three variants of draft article 29 offered for its consideration in paragraph 14 of A/CN.9/WG.III/WP.67, Variants A, B and C, and an additional text of draft article 29 set out in paragraph 3 of A/CN.9/WG.III/WP.69, which was identical to Variant C, but for the title of the provision and for the use of the word "cargo" rather than "goods".

*Variant A, B or C of draft article 29*

176. While the view was offered that Variant A did not appear to be substantively different from Variant B, there was little support in the Working Group for Variant A, which was text as it appeared in A/CN.9/WG.III/WP.56.

177. Variant B was the preferred text of a number of delegations for various reasons. Although it was framed as a right of the shipper, Variant B was said to adequately reflect the idea favoured by the Working Group at its previous session (see A/CN.9/591, paras. 121 to 127) that the provision should focus on the mutual cooperation of the shipper and the carrier in the provision of information and the successful completion of the contract of carriage. It was thought that this was particularly evident given the references in draft article 29 to draft articles 28 and 30, which contained the primary obligations of the shipper, and thus indicated that the carrier must provide necessary assistance to the shipper in order to enable it to fulfil those obligations. It was suggested that the phrase "within the carrier's knowledge and as may be specified by the shipper" should be inserted in Variant B after the word "information". There was some support for the view that the requirement that the carrier provide the information sought in Variant B should be limited to some extent, but the view was expressed that the insertion of the suggested text could render it too easy for the carrier to avoid assisting the shipper by providing the necessary information.

178. There was also support expressed for Variant C of draft article 29. The view was expressed that Variant C was a more general provision that was a better reflection of the view favoured by the Working Group at its last session as discussed in the paragraph above. Some concern was expressed regarding the notion of the "good faith" obligation in Variant C which, while common in some legal systems, might be regarded as merely hortatory in others.

179. However, the view was also expressed that Variant B and Variant C did not differ substantially, and some held the view that it was difficult to choose one over the other. It was generally agreed that Variant C was broader and more general than Variant B, but the concern was expressed that Variant C might be such a general and basic responsibility that it did not sufficiently specify any legal right or obligation. It was thought that Variant B accomplished that task better, and that it presented a middle position between the articulation of firm obligations and the general responsibility of both parties to cooperate. In addition, some views were expressed that if the Working Group did not accept a specific limitation on the information

that a carrier would be required to obtain pursuant to Variant B, or if the reference to draft article 30 in Variant B were deleted (see paras. 182 to 184 and 186 below), that Variant C would be the better text for draft article 29.

180. It was suggested that given the importance of the mutual obligation for the shipper and the carrier to cooperate in supplying information for the completion of the contract of carriage, it might be better to give that obligation more prominence in the draft chapter. It was thought that it might be possible to accomplish this by means of incorporating the content of draft article 29 into draft paragraph 28 (1). Another drafting suggestion was made to broaden the current reference in Variant C from "information and instructions required for the safe handling and transportation of goods" which might be interpreted too restrictively as referring only to draft paragraphs 30 (a) and (b) (see paras. 183 and 184 below).

181. An additional view was expressed that draft article 31 was the basis of the shipper's liability, and that as long as that key provision applied the standard of fault-based liability on the shipper for breach of its obligations under draft articles 28 and 30, there was no need for draft article 29 and it should be deleted. While outright deletion of draft article 29 did not receive support, there was strong support for the view that the discussion in the Working Group regarding draft articles 29 and 30 was dependent on draft article 31 containing an appropriate fault-based liability standard with respect to the obligations of the shipper. In addition, it was observed that draft paragraph 17 (3)(h) was of relevance to the discussion, since it relieved the carrier of all or part of its liability when the carrier could prove that the loss of, or damage to, the goods occurred as a result of the acts or omissions of the shipper.

*Reference in draft article 29 to draft article 30*

182. It was proposed that the application of draft article 29 should be broadened to include reference to draft article 30, and possibly to draft paragraph 33 (2). The view was expressed it might be difficult to limit the actual text of draft article 30 through specific drafting, but that subjecting the provision to the mutual obligations of draft article 29 would be an appropriate technique through which to limit the breadth of the obligations of the shipper in draft article 30.

183. Some doubts were expressed regarding the appropriateness of inserting a reference to draft article 30 into draft article 29. The view was expressed that reference to draft article 28 in draft article 29 was appropriate, since draft article 29 was intended to provide the shipper with any assistance needed in terms of information from the carrier so that the shipper could fulfil its obligation to properly ready the goods for carriage. It was thought that the shipper's obligations set out in draft article 30 concerned information that was largely, if not exclusively, in the domain of the shipper, and thus the carrier could not assist in obtaining the information. In particular, it was noted that paragraphs (a) and (c) of draft article 30 referred to the handling and the characteristics of the goods, and the view was expressed that these were matters with which the carrier could grant little assistance. There was some support for that view.

184. However, some concerns were raised with respect to specific paragraphs in draft article 30. Some support was expressed for the inclusion of paragraph (a) in draft article 29, but there was stronger support for the inclusion of a reference to

draft paragraph 30 (b) only. It was thought that the paragraph (b) reference to "the intended carriage" clearly required that some information be provided by the carrier to the shipper in order to enable the shipper to fulfil its duties under the paragraph. A concern was raised that inserting a reference to draft paragraph 30 (b) into draft article 29 would result in excessively regulating the requirement set out in paragraph (b), such that it could result in an endless circle of the shipper and the carrier blaming each other for failures to provide information. It was suggested that this example, in particular, indicated that the more general version of draft article 29 set out in Variant C above (see above, paras. 179 and 180) was preferable to Variant B in order to avoid such difficulties arising from excessive detail.

*Retention of draft article 18*

185. The view was expressed that, to some extent, the Working Group's decision regarding whether to choose Variant A, B or C of draft article 29 was related to its decision regarding whether or not to retain draft article 18 in the text of the draft convention. However, it was recalled that the Working Group had decided at its last session to delete draft article 18, pending the receipt of instructions by a few delegations (see A/CN.9/591, paras. 184 to 187). Although it was suggested that if the Working Group decided to retain the general provision in Variant C of draft article 29, it might want to consider whether it should retain the more specific articulation of the carrier's liability for failure to provide information and instructions set out in draft article 18, the Working Group decided to delete draft article 18 from the draft convention.

*Conclusions reached by the Working Group regarding draft articles 29 and 18:*

186. After discussion, the Working Group decided that:

- The Secretariat should be requested to revise the text of draft article 29 based on the approach taken in Variant C in paragraph 14 of A/CN.9/WG.III/WP.67, with certain adjustments to the drafting to take into consideration the concerns expressed in the discussion above; and

- Draft article 18 should be deleted from the text of the draft convention.

**Draft article 30. Shipper's obligations to provide information, instructions and documents**

187. The Working Group was reminded that three alternative texts of draft paragraph 30 (b) had been submitted for its consideration: Variants A and B in paragraph 20 of A/CN.9/WG.III/WP.67, and the version presented in paragraph 6 of A/CN.9/WG.III/WP.69. It was explained that Variant A was the text of draft paragraph (b) as it appeared in A/CN.9/WG.III/WP.56, and that the text in paragraph 6 of A/CN.9/WG.III/WP.69 differed slightly from that of Variant B in both the chapeau for draft article 30 and the text of paragraph (b) itself.

*Chapeau of draft article 30*

188. It was explained that the text of the chapeau of draft article 30 contained in A/CN.9/WG.III/WP.69, paragraph 6, included after the word "documents" the phrase "related to the goods". There was general approval for the insertion of that

phrase into the chapeau of draft article 30 as rendering the obligations it contained more specific and more appropriate in terms of scope.

*Text of draft paragraph 30 (b)*

189. Some preference was expressed for Variant A of draft paragraph 30 (b) since it provided a simple drafting approach for a provision that was said to become very complex when any further specificity was sought. However, concerns were expressed that Variant A was too broad and too unclear, and that more detail was needed in order to appropriately circumscribe the shipper's information obligations.

190. It was explained that while a fault-based liability on the part of the shipper as set out in draft article 31 would assist in narrowing the breadth of the shipper's obligations in draft article 30, it was thought that further refinements should also be made to draft paragraph 30 (b). It was explained that the text of draft paragraph 30 (b) as contained in paragraph 6 of A/CN.9/WG.III/WP.69 intended to specify that the information sought from the shipper in compliance with rules and regulations by government authorities would likely be sought under two alternative scenarios: either the shipper would be required by applicable law to provide it, or the carrier would advise the shipper in a timely fashion of the information required. Further it was thought that the shipper would not be required to provide the information if it was already reasonably available to the carrier.

191. While general support was expressed for the more specific text contained in draft paragraph 30 (b) as set out in paragraph 6 of A/CN.9/WG.III/WP.69, some concerns were raised with respect to its structure. It was suggested that if the reference to "applicable law" in draft subparagraph (i) was intended to refer to mandatory rules of public law, the view was expressed that this should not be listed as an alternative to subparagraph (ii), since public law rules would apply regardless of whether or not they were mentioned in the draft convention. Further, questions were raised regarding what types of scenarios were envisioned pursuant to draft subparagraph (i). In response, it was clarified that this was intended to satisfy, for example, certain security requirements such as those requiring the carrier to provide the manifest information, which would have to be obtained from the shipper, to the customs authorities of a given country twenty-four hours in advance of loading the vessel for importation into that country.

192. Several drafting issues were also raised with respect to the text of draft paragraph 30 (b) as set out in paragraph 6 of A/CN.9/WG.III/WP.69. Concern was raised regarding the use of the phrase "government authorities" as being too narrow, and it was suggested that a different phrase such as "local authorities", "public authorities" or merely "authorities" would be more appropriate. Further, some concerns were raised about the specification of "rules and regulations", and it was thought that that text might need to be revisited. In addition, several concerns were raised about the use of the phrase "applicable law", which could be said to refer to the law of the contract of carriage, or to rules of public law, and it was suggested that greater clarity could be attained, perhaps by deleting the phrase altogether. Further, the question was raised whether the text, "the shipper is required by applicable law" was appropriate, since any law was unlikely to specify who was required to provide the information in issue. In addition, it was suggested that "timely makes known to" could be replaced by "timely notifies", and that reference could also be made to the "intended voyage", in keeping with the text in Variant A.

193. In addition, in light of the above discussion in the Working Group, the importance of retaining a fault-based liability regime for the shipper pursuant to draft article 31 was reiterated by several delegations.

*Conclusions reached by the Working Group regarding draft paragraph 30 (b):*

194. After discussion, the Working Group decided that:

- The text of draft paragraph 30 (b) should be based upon that contained in A/CN.9/WG.III/WP.69, paragraph 6; and
- The Secretariat should be requested to make the necessary modifications to the text in light of the concerns raised in the paragraphs above.

**Draft article 33. Special rules on dangerous goods**

*Requirement for similar obligation to draft article 29*

195. The Working Group was reminded that concerns had been raised during its sixteenth session regarding whether the paragraph in draft article 33 dealing with the obligation of the shipper to mark or label dangerous goods in accordance with the applicable local rules depending on the stage of the carriage could place too heavy a burden on a shipper if it was not aware of the intended voyage (see A/CN.9/591, para. 163). It was suggested at that time that it might be advisable to require the carrier to provide the necessary information to the shipper in order to allow the shipper to fulfil its obligations pursuant to draft article 33. It was proposed that the text of a new draft paragraph 33 (4) as set out in paragraph 31 of A/CN.9/WG.III/WP.67 could be inserted into the provision in response to those concerns.

196. In light of the Working Group's decision to revise the text of Variant C of draft article 29 based on a general obligation of mutual cooperation between the shipper and the carrier (see para. 14 of A/CN.9/WG.III/WP.67), it was suggested that the text of draft paragraph 33 (4) would not be appropriate, since that text was intended to reflect the more specific obligations in Variant B of draft article 29. There was general support in the Working Group for the view that appropriately drafted text based on the approach in Variant C of draft article 29 would render the insertion of draft paragraph 33 (4) unnecessary.

197. However, some concern was expressed that, since draft subparagraph 30 (b)(ii) on the obligation of the carrier to timely make its information needs known to the shipper (as set out in para. 6 of A/CN.9/WG.III/WP.69) was still thought to be necessary in spite of the adoption of a provision along the lines of Variant C of draft article 29, it was thought that further clarification of the obligation in draft article 33 might also be necessary. In light of this possibility, it was suggested that draft paragraph 33 (4) should be inserted into the text in square brackets for future consideration by the Working Group, or, in the alternative, that some qualification along the lines of draft paragraph 30 (b) that limited the shipper's obligation could be inserted in the appropriate paragraph of draft article 33. In response to those concerns, it was said that the text of draft paragraph 30 (b) was a much broader obligation than that in draft article 33, and that it was therefore necessary to more specifically qualify it, and not merely rely on the general obligation of mutual cooperation articulated in Variant C of draft article 29.

*Conclusions reached by the Working Group regarding draft paragraph 33 (4)*

198. After discussion, the Working Group decided that:

- Draft paragraph 33 (4) would be unnecessary and could be deleted, provided that the redrafted text of draft article 29 based on the approach taken in Variant C (of para. 14 of A/CN.9/WG.III/WP.67) was sufficient to address concerns regarding the mutual provision of information necessary for the shipper to fulfil its obligations in draft article 33.

**Draft article 31. Basis of shipper's liability: Delay**

199. It was recalled that the Working Group had last considered the shipper's liability for delay at its sixteenth session (see A/CN.9/591, paras. 133 and 143 to 147) and that written proposals on this topic had been submitted for the consideration of the Working Group (see A/CN.9/WG.III/WP.67, para. 22, and A/CN.9/WG.III/WP.69, paras. 8 to 14). It was indicated that delay was an important pending issue in the chapter on shipper's obligations, as it gave rise to complex problems.

200. There was support within the Working Group for retaining the provisions of the draft convention dealing with carrier and shipper liability for delay. It was indicated that such provisions, which did not exist in earlier instruments such as the Hague Rules, would provide an important contribution to modernizing the law of carriage. It was also recalled that timeliness had a prominent importance in liner transportation and in modern logistics arrangements in the commercial world. It was also indicated that other persons in the transactions, especially the consignee, should be protected from any losses caused by the shipper or the carrier. It was indicated that the Working Group had already completed its consideration of carrier liability for delay at its thirteenth session (see A/CN.9/552, paras. 18 to 31), and that such liability was regulated under draft article 22, with the exception of the level of limitation of such liability, which was dealt with in draft article 65 in the chapter on limitation of liability. It was therefore indicated that the Working Group should not re-open the discussion on that draft article.

201. There were nevertheless strong objections to the inclusion of consequential damages for delay for both shippers and carriers in the draft convention. It was indicated that such inclusion might create enormous, open-ended liability exposure for shippers. For instance, it was explained, a shipper's failure to provide a document might prevent the unloading of a single container loaded with goods of small value, and this in turn might prevent the entire ship of containers from arriving and unloading at its port of destination. In that case, it was added, while reasons of fairness would suggest that the carrier should be able recover from that shipper the damages for delay for which the carrier was responsible to other shippers with containers on board, if the shipper was to be held fully liable to the carrier for all damages caused by its delay of the vessel, its liability could not only have a devastating financial impact on it but would also be uninsurable. It was added that the difficulties surrounding the establishment of a reasonable and logical liability limit that could be applied to the shipper's liability for damages due to delay, as well as of a liability regime that allowed for insurability of the potential risks associated with damages for delay, supported the deletion of liability for delay on the part of the shipper from the draft convention. It was further indicated that, in

order to ensure fairness and balance in the draft convention, liability for consequential damages for delay should likewise be eliminated from the carrier's liability to shippers, except as the parties to a shipment may expressly agree, since holding carriers liable to shippers for delay exposed them to significant potential liabilities in the same manner as holding shippers liable to carriers would.

202. Furthermore, it was said that in order to maintain a fair balance in the draft convention, it was essential to include a mirror provision establishing liability for a shipper who caused the delay and exposed a carrier to losses resulting from delay claims against it by other shippers, and that because carrier liability for delay damages would be limited, such shipper liability should also be subject to a reasonable limitation. However, it was added that efforts to develop an acceptable limitation on shipper liability for damages for delay had proven to be an extremely difficult task, since a limitation based on the freight paid by the offending shipper was deemed to be unreasonably low by carrier interests, while shipper interests found other formulations, such as full responsibility for damages for delay to all other shippers on the vessel, unreasonably high. It was also indicated that a carrier should be fairly protected against any losses it incurred for delay damages caused by a shipper, albeit the resultant liability on one shipper could be significant. It was concluded that the only equitable resolution to this dilemma would be to remove the concept of liability for damages for delay from the draft convention with regard to shippers and, unless they agreed in a contract of carriage or volume contract on a date certain for delivery of the cargo, for carriers as well. It was therefore suggested that draft article 22 should be amended to reflect that the carrier's liability for economic loss due to delay would be limited to those cases where the carrier had agreed to such liability.

203. It was recalled that a drafting proposal had been submitted to the Working Group (see A/CN.9/WG.III/WP.69, paras. 8 to 14), under which the shipper would have no liability for consequential damages arising from delay, and the carrier's liability would be limited accordingly. It was explained that such a result might be achieved by amending and deleting various references to delay in the draft convention, and by inserting a new draft article 36 bis (see A/CN.9/WG.III/WP.69, para. 14), whose scope was to prevent a possible interpretation of "damage or loss of goods" under the draft convention encompassing damage or loss caused by delay other than physical damage or loss. In response to a query, it was explained that the consequential damages caused by delay that would not be recoverable under the proposed text of the draft convention included damages for pure economic loss as well as damages that could be said to arise from partial economic loss such as, for example, market price fluctuation during the period of time in which the delay occurred. It was further explained that the carrier, as well as the shipper, would continue to be held liable for physical loss or damage to goods under draft article 17, as well as in those cases in which the parties had concluded an express agreement on the delivery date.

204. In reply, it was indicated that the suggested approach would amount to depriving the parties of any remedy for economic loss that might be available under national law. While support was expressed for the concerns about the difficulties in drafting a satisfactory text, it was therefore suggested that the ideal solution to address the liability for delay under the draft convention would not consist of limiting such liability for the carrier, but to leave the matter under the domain of

national law for all types of loss due to delay. It was further suggested that in order to fully exclude claims for economic loss under the proposal, it might not be sufficient to simply eliminate references to "delay" in the draft convention, but it might also be necessary to include a provision barring any claim in this regard by the carrier against the shipper. As a drafting suggestion, it was proposed that such a draft provision could be inspired by draft article 4, which might require some redrafting of draft article 36 bis contained in A/CN.9/WG.III/WP.69, paragraph 14.

205. The Working Group considered at length the above suggestions. It was further indicated that leaving the rules on liability for delay to national law would not only fail to unify the law on the matter, but would also perpetuate the existing unfair practice, pursuant to which the carrier inserted clauses exonerating it from liability for economic damages for delay in bills of lading, while the shipper had no corresponding safeguard. It was further indicated that the greatest level of unification of the law on this matter would be desirable, as this would improve not only legal predictability but also the insurability of the risk, while leaving the matter under different domestic legal regimes would run counter to those goals. A view was also expressed that the carrier's and the shipper's liability for delay need not be considered together, since the carrier's liability for delay touched upon the primary obligation of the carrier to deliver the goods, while the same liability for the shipper touched upon secondary obligations of the same. It was also said that, while problematic, delay should not be too easily discarded as a basis of liability. For example, the shipper's liability for delay could be limited as it would likely be fault-based, the burden of proof would be allocated to the claimant according to ordinary rules, and the action could be subject to a short limitation period, possibly of one year. In support of a provision in the draft convention on the liability for delay, it was also said that finding an equitable solution for limitation of liability for delay, albeit difficult, was not an impossible task, since indeed certain domestic legislation contained rules relating to the shipper's liability for delay, which was, for example, limited with relation to the weight of the goods shipped. It was added that, under an alternative approach, the limitation of the shipper's liability for delay could be linked to the freight paid, although problems with that approach were pointed out, as, for example, in the case where the measure would be the freight paid on a container of low value goods that had delayed the arrival of other containers of very high value goods. A view was expressed that a rule on the carrier's liability for delay could be included even though there was no rule on the shipper's liability for delay.

206. In response, the view was expressed that, while legal unification was indeed a desirable result, insurability of the risk depended not on the uniformity of the rule, but rather on the limitation of the amount of liability. The Working Group was urged not to underestimate the difficulty of that task. In the search for a possible solution, the Working Group was invited to consider the types of damages that might be covered in a system of liability for delay under the draft convention. In this respect, it was said that, while physical damages would always be recoverable, damages for pure economic loss and damages for partial economic loss due to market variations in the value of the goods during the period of delay should fall outside the scope of application of the draft convention. It was suggested that the parties should be allowed to derogate from draft article 22, on the liability of the carrier for delay, insofar as it related to damages pertaining to economic loss, through the exercise of their freedom of contract. It was specified that under such provision the carrier

would be liable for delay unless there was contractual agreement otherwise. However, concerns were raised that, depending on the final text of draft article 94, such freedom of contract could also be used to increase the shipper's liability for delay, and that such an outcome would go against the intended scope of the draft provision.

*Conclusions reached by the Working Group regarding liability for delay:*

207. After discussion, the Working Group decided that:

- The consideration of the liability for delay in the draft convention should continue at a future session, after consideration of the issues presented;
- The submission of written submissions on the matter for consideration at its next session was strongly encouraged; and
- The consideration of any further issues of concern to the Working Group with respect to the obligations of the shipper was suspended pending the future consideration of delay.

## Proposal on bills of lading consigned to a named person

208. The Working Group was reminded that a proposal had been made in A/CN.9/WG.III/WP.68 for the inclusion in the draft convention of provisions on bills of lading consigned to a named person. It was stated that while the entire scheme of the draft convention was based solely on negotiable and non-negotiable transport documents and electronic transport records, in practice, another type of transport document was used whose characteristics fell somewhere between those two categories: the bill of lading consigned to a named person. It was noted that this document was in common use in some legal systems, although it went by different names depending on the jurisdiction and that it was subject to different rules, sometimes even within the same jurisdiction. Further, although it was thought that the legal framework established in the draft convention made the inclusion of the bill of lading consigned to a named person superfluous, it was thought that some provision should be made for their treatment in the draft convention, since commercial practice could not be expected to change immediately upon the entering into force of any new regime. The Working Group agreed to limit its consideration of this proposal at its current session to the two main issues of whether to include such provisions in the draft convention, and how to define bills of lading consigned to a named person, leaving other issues for future discussion.

*Should bills of lading consigned to a named person be included?*

209. The view was expressed that if the framework of the draft convention was thought to be inclusive of all necessary types of documents, allowing for this unusual intermediate document with uncertain characteristics could be seen as encouraging its use, and that it would be better to put an end to such anomalies. As such, a preference was expressed that specific provision should not be made in the draft convention for bills of lading consigned to a named person, and that they should instead be subjected to the general scheme of negotiable or non-negotiable documents.

210. However, the opposite view was also expressed that bills of lading consigned to a named person should be included in the draft convention, since subjecting them to at least some uniform rules in this fashion could have the welcome result of decreasing the uncertainty of law with respect to their use. Some views were expressed that although bills of lading consigned to a named person were not used in their specific jurisdictions, it was recognized that this intermediate form of document was in use elsewhere, and that including provisions with respect to them in the text of the draft convention could assist in making the draft convention more effective and more efficient in those jurisdictions. Support was expressed for this view based on the commercial practicality of including such documents if they were in use, and assuming that their inclusion would provide additional commercial certainty.

*Conclusions reached by the Working Group regarding the inclusion of bills of lading consigned to a named person:*

211. After discussion, the Working Group decided that:

- Provisions on bills of lading consigned to a named person should be included in the draft convention.

*Definition of bills of lading consigned to a named person*

212. It was proposed in paragraph 12 of A/CN.9/WG.III/WP.68 that the bill of lading consigned to a named person should be defined as "a non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods". It was explained that the intention of the proposal was to treat such bills of lading as non-negotiable documents within the ambit of the draft convention, and that the document should carry with it the requirement that it must be shown or surrendered to the carrier when the possessor of the document wanted to exercise any right under the contract of carriage evidenced by the document, or the so-called "presentation rule". The final necessary element of the definition was thought to be that the "presentation rule" should be stated on the document itself in order to indicate the element of negotiability of the document. It was thought that there was an appropriate combination of elements in the definition to allow it to fit with current commercial practice, in which parties could agree on the requirement of presentation of a non-negotiable document, and that standard form bills of lading consigned to a named person typically contained a statement of the "presentation rule".

*"indicates"*

213. It was explained that the word "indicates" had been used in the definition rather than a more specific word such as "stated" in order to provide greater flexibility and to allow various documents to be interpreted as falling within the definition. While there was some support for the text of the definition as presented, some concern was expressed that the word "indicates" was too flexible and broad, and that it would allow documents that had not been intended as bills of lading consigned to a named person to nonetheless be treated as such. A proposal was made to replace the word "indicates" with a more precise word, such as "specifies".

214. Another suggestion was made to clarify the definition by inserting the phrase "under the law governing the document" after the word "indicates", similar to the definition of "negotiable transport document" in draft paragraph 1 (o). Given the possibility of unclear text appearing on a document such as "the carrier can require the surrender of this document upon delivery of the goods", it was thought that it was important that the definition should be interpreted according to the applicable law governing the document. Some hesitation was expressed that the insertion of a phrase with respect to the applicable law would unduly restrict the definition and thus the interpretation of which documents would fall within that category, particularly since judicial treatment of bills of lading consigned to a named person was not uniform. In response, it was suggested that the flexibility inherent in the word "indicates" would remain, but that insertion of a phrase on the applicable law would provide some necessary structure for the exercise of that discretion.

*Conclusions reached by the Working Group regarding the definition of bills of lading consigned to a named person:*

215. After discussion, the Working Group decided that:

- The definition of bills of lading consigned to a named person was not entirely satisfactory, as the word "indicates" was too flexible; and
- The Secretariat should prepare alternative definitions that avoided suggesting that a particular phrase must be found in the transport document in order for it to be a bill of lading consigned to a named person and that took into account the possible need for a reference to the law governing the transport document.

## Transport documents and electronic transport records—Chapter 9

216. The Working Group was reminded that it had most recently considered the chapter of the draft convention on transport documents and electronic transport records at its eleventh session (see A/CN.9/526, paras. 24 to 61). It was also recalled that proposals concerning transport documents and electronic transport records had been presented for the consideration of the Working Group at its current session (A/CN.9/WG.III/WP.62 and A/CN.9/WG.III/WP.70). Further, it was noted that the text of the provisions set out in A/CN.9/WG.III/WP.62 was the current text of the draft convention as found in A/CN.9/WG.III/WP.56, without modification, while A/CN.9/WG.III/WP.70 suggested alternative text with respect to draft article 37 and draft paragraph 40 (3).

217. The Working Group agreed with the suggestion that it should consider the chapter on transport documents and electronic transport records using an article-by-article approach, since it was the first time that it was considering the chapter during its second reading of the draft convention. Further, it was observed that while reference in the course of discussion was often made to "transport documents" only, it was understood that reference was made equally to "electronic transport records".

**Draft article 37. Issuance of the transport document or the electronic transport record**

218. The Working Group was reminded that the historical antecedents of draft article 37 were article 3 (3) of the Hague and Hague-Visby Rules, where the carrier issued the bill of lading to the shipper on the shipper's demand, and article 14 (1) of the Hamburg Rules, which provided for the issue of the bill of lading to the shipper, and, by way of the definition of the "shipper", the consignor. It was noted that the principal innovation of draft article 37 of the draft convention was the recognition that the "consignor" was not necessarily the same as the "shipper", for example, in the case of an FOB seller that was the "consignor" and an FOB buyer that was the "shipper". While it was acknowledged that in most cases the shipper and the consignor would be cooperating in light of the contract of sale, it was possible that a dispute would arise, and it would therefore be important which documents had been received by each party. It was explained that draft article 37 was intended to regulate those situations where a dispute had arisen by entitling the consignor to receive a transport document evidencing receipt only, while the shipper or the documentary shipper was entitled to receive a negotiable transport document in order to protect its interests until payment was made under the contract of sale.

219. It was observed that the proposed text of draft article 37 in A/CN.9/WG.III/WP.70 was substantively different from that currently in the draft convention. The approach taken in the text set out in A/CN.9/WG.III/WP.70 was that the consignor, and not the shipper, would effectively control the goods, and that the shipper would not control the goods until it was so permitted by the consignor.

220. Concern was expressed regarding the approach taken in draft article 37 of the current text of the draft convention. It was thought that under an FOB contract of sale, the FOB seller, or consignor, would not receive sufficient protection under draft article 37 because it would receive only a receipt rather than a negotiable document. It was suggested that there were two problems with draft article 37: the receipt obtained by the consignor had no legal status, and that one of the functions of a bill of lading was as evidence of receipt of the goods. In addition, it was said that in some jurisdictions, the person delivering the goods to the carrier had an independent right to obtain a negotiable transport document, and that the consignor in an FOB sale should receive the negotiable document as security for goods when it delivered them to the carrier. As such, a preference was expressed by some for the version of draft article 37 contained in A/CN.9/WG.III/WP.70.

221. However, the opposite view was expressed that the approach set out in draft article 37 of the current text of the draft convention was appropriate in the case of an FOB sale. Pursuant to paragraph (a) of draft article 37, the consignor had an independent entitlement to obtain a receipt from the carrier indicating that the goods had been delivered for carriage. Under paragraph (b) of draft article 37, the shipper was entitled to obtain the appropriate transport document from the carrier, and it was intended to be the choice of the shipper whether the transport document issued by the carrier was negotiable or non-negotiable, unless it was the custom in the trade not to issue a document at all. It was thought that reference in paragraph (b) to "the person referred to in article 34", or the documentary shipper, adequately protected the FOB seller or consignor. While under an FOB sale, the FOB seller would usually act on behalf of the FOB buyer, that was not the case under the contract of carriage, where the FOB seller had an independent right to obtain the

transport document. The only way for the carrier to know that the FOB seller, or consignor, was entitled to the negotiable transport document rather than the FOB buyer, or shipper, was if the shipper instructed the carrier that the draft article 34 documentary shipper, i.e. the FOB seller, should receive the negotiable transport document. Further, the shipper, or FOB buyer, would be under an obligation to notify the carrier in this regard under the terms of the contract of sale. Under this mechanism, the FOB seller, or consignor, would receive the negotiable transport document and was thought to be adequately protected. It was thought that this was an appropriate approach, and that the parties to the sales contract should build protection for their interests into that contract, and should not look to the parties to the contract of carriage to provide such protection.

222. There was support for the view that the documentary shipper should have an independent right to receive a transport document under paragraph (b) of draft article 37 rather than relying on the terms of the contract of sale for such protection. Therefore, a preference was expressed for the approach as set out in draft article 37 of the draft convention over that set out in A/CN.9/WG.III/WP.70, which was said to be imprecise regarding the identity of the consignor, given the broad definition of "consignor" in draft article 1 (i), which included anyone who actually delivered the goods to the carrier, even, for instance, a truck driver. Further, it was said that the approach in A/CN.9/WG.III/WP.70 appeared to create a novel and complex system where the consignor obtained the receipt for the goods and could then exchange it for a negotiable transport document, and that this approach was not necessary to provide the FOB seller with a document in its own right to protect itself.

223. A number of drafting suggestions were made aimed at the clarification of draft article 37. It was generally agreed that the text in paragraph (a) should be clarified to indicate that it referred to a mere receipt and not to a transport document or a receipt, bearing in mind that the definition of "transport document" in draft article 1 (n) included a receipt. There was also agreement that reference should be made in paragraph (b) to both negotiable and non-negotiable transport documents and electronic transport records, and that it could be clarified that it was the choice of the shipper whether the carrier issued a negotiable or a non-negotiable transport document. It was thought that the phrase "expressly or impliedly" was probably unnecessary in draft paragraph (b), and it was suggested that it be deleted. It was observed that that phrase was repeated in various provisions in the text of the draft instrument, and it was agreed that regard would be had to each such reference and whether it was necessary in each particular instance.

*Conclusions reached by the Working Group regarding draft article 37:*

224. After discussion, the Working Group decided that:

- The approach taken in the text of draft article 37 was acceptable; and
- The text of draft article 37 should be modified by the Secretariat to include: an appropriate reference in draft paragraph (a) to indicate that it referred to receipts; an indication in draft paragraph (b) that it was the shipper's right to choose which document it wanted the carrier to issue; reference to non-negotiable transport documents should be included in draft paragraph (b); and the use of the phrase "expressly or impliedly" should be reviewed for possible deletion throughout the text of the draft convention.

**Draft article 38. Contract particulars**

225. It was indicated that the goal of draft article 38 was to set out the minimum mandatory requirements of the contract particulars. It was recalled that in informal discussions, suggestions for additional items and for drafting adjustments to the text of the provision had been noted for the consideration of the Working Group (see A/CN.9/WG.III/WP.62, paras. 12 to 18).

226. Broad support was expressed in the Working Group for the text of draft article 38, as contained in A/CN.9/WG.III/WP.56.

227. It was indicated that the list of mandatory requirements should be limited as much as possible to strictly necessary items. It was added that the parties were free to agree on further requirements in the contract particulars should their commercial needs require them. The Working Group was, however, informed that a number of possible additional mandatory items had been mentioned in informal consultations on the chapter (see A/CN.9/WG.III/WP.62, para. 14). They included the name and address of the shipper or consignor; the name and address of the consignee; the places of receipt and discharge and the ports of loading and unloading; the number of originals of the transport document; a statement, if applicable, that the goods would or could be carried on deck; and an indication of the dangerous nature of the goods.

228. It was suggested that the words "as furnished by the shipper" should be added in draft paragraph 38 (a). It was further suggested that the words "before the carrier or a performing party receives the goods" in draft paragraphs 38 (b) and (c) should be deleted since the information might be also usefully provided after the carrier or a performing party received the goods but before the goods were loaded on the vessel. It was thought that the element of timeliness of the information could be inserted by way of a reference to the information furnished by the shipper in accordance with draft article 30.

229. It was further added that the word "and" at the end of draft paragraph 38 (c)(i) should be replaced by the word "or". It was explained that such amendment would better reflect trade practice, under which the shipper provided the carrier with either the number of packages, the number of pieces, or the quantity of the goods, or with the weight of the goods, and that it would be an unnecessary burden to require the inclusion of both elements. In response, it was indicated that the provision was intended to require the carrier to include both information on the number of packages and the weight in the contract particulars only when the shipper had so requested and had provided the corresponding information. It was observed that this could also be accomplished by way of the insertion of the word "if" rather than the word "as" in subparagraph (c)(ii).

230. It was suggested that a reference to the number of originals of the negotiable transport document should be inserted in draft article 38. It was indicated that such a reference would protect third party holders of the negotiable transport document by indicating how many originals were in circulation. It was noted that, while the practice of issuing multiple originals of negotiable transport documents should be discouraged, the suggested provision could nevertheless be useful as long as the undesirable practice continued. It was also suggested that reference to the consequences of failing to include information on the number of originals of the negotiable transport document could be included in draft article 40.

231. It was suggested that reference to the places of receipt and discharge and the ports of loading and unloading should be inserted in draft article 38, as those places and ports were relevant to determine the scope of application of the draft convention as well as for the purpose of the applicability of the provisions on jurisdiction and arbitration. It was also suggested that a reference to the dangerous nature of the goods should be included for reasons of public order, as well as to ensure that the shipper fulfilled its obligation to provide information under draft article 33. It was further suggested that reference to carriage of the goods on deck should also be inserted in the same draft article. However, those suggestions did not gather sufficient support in the Working Group.

232. It was indicated that the chapeau of draft article 38 should be revised to ensure consistency with the agreed content of draft article 37 insofar as its reference to transport document or electronic transport record.

*Conclusions reached by the Working Group regarding draft article 38:*

233. After discussion, the Working Group decided that:

- The words "as furnished by the shipper" should be added in draft paragraph 38 (a);
- The words "before the carrier or a performing party receives the goods" in draft paragraphs 38 (b) and (c) should be substituted by a reference to the information required in draft article 30;
- A reference to the number of originals of the negotiable transport document should be inserted in draft article 38; and
- The Secretariat should prepare a revised version of draft article 38 bearing in mind the considerations expressed above including possible modification of the reference to draft article 37 contained in the chapeau.

## III. Other business

### Scheduling of eighteenth, nineteenth and twentieth sessions

234. It was noted that, subject to the approval of the Commission at its thirty-ninth session, the eighteenth session of the Working Group would be held in Vienna from 6 to 17 November 2006 (see A/60/17, para. 241), and that the nineteenth session of the Working Group would be held in New York from 16 to 27 April 2007. It was further noted that, subject to the approval of the Commission at its fortieth session, the twentieth session of the Working Group would be held in Vienna from 15 to 25 October 2007.

### Planning of future work

235. With a view to structuring the discussion on the remaining provisions of the draft instrument, the Working Group adopted the following tentative agenda, for treatment in the order indicated, for the completion of its second reading of the draft instrument:

*Eighteenth session (Vienna, 6 to 17 November 2006, subject to approval):*

- Jurisdiction and arbitration;
- Transport documents and electronic transport records (*continued*);
- Delay and outstanding matters regarding shipper's obligations (*continued*);
- Limitation of liability, including draft article 104 on amendment of limitation amounts;
- List of potential topics to be deferred for future consideration in another instrument, such as a model law;
- Rights of suit and time for suit; and
- Final clauses, including relationship with other conventions and general average.

236. The Working Group expressed its strong satisfaction with the steady progress made on the draft convention. In view of the number and complexity of the issues awaiting finalization in the draft convention, the Working Group expressed the view that it would require additional time to conclude it. The Working Group agreed that it was on target to complete its second reading of the draft convention at the end of 2006 and the final reading at the end of 2007.

*Notes*

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.

[2] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 182.